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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD A. ZUMBRUN
EDWARD J. CONNOR, JR.
*JOHN M. GROEN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The City of Sacramento requires that developers of commercial properties pay a fee, as a condition to project approval, to fund low-income housing projects. Sacramento justifies this fee with the argument that new commercial buildings will facilitate new job opportunities which in turn will be filled by new workers who migrate to the community, some of whom will need low-cost housing.

1. When faced with a Takings Clause challenge to a city's housing fee exaction, did the Ninth Circuit err in holding, as a matter of law, that a legally sufficient nexus exists where there is a showing that commercial development is merely "related" to an increased need for low-income housing even though the city's study concludes that its "nexus analysis does not make the case that building construction is responsible for growth"?

2. Where a permit condition is challenged as a taking, does *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 n.3, 841 (1987), require a greater degree of judicial scrutiny of the exaction and its alleged nexus to a proposed project than that afforded by the "rational basis" standard of review used by the Ninth Circuit?

3. Does the creation of new job opportunities through commercial development constitute an adverse impact upon a community that can justify imposing a mitigation fee on the builder to address the low-income housing needs of the community?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 941 F.2d 872 (1991), and is reproduced as Appendix (App.) A. Page references are to the version in the appendix. The unpublished decision of the United States District Court for the Eastern District of California is in the form of a signed judgment and is reproduced as Appendix B.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on August 7, 1991, and filed its order denying a petition for rehearing on January 7, 1992. Appendix C (order denying petition for rehearing). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND ORDINANCE PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The ordinance at issue is City of Sacramento Ordinance No. 89-013, adopted March 7, 1989. The text of the ordinance is reproduced as Appendix D.

STATEMENT OF THE CASE

A. Procedural History

This action was originally filed in the Superior Court of the State of California, County of Sacramento. As

originally filed, the action included a number of claims based on state law as well as the federal Constitution. Because of the presence of federal constitutional claims, the defendant, City of Sacramento (city), removed the action from state court to federal District Court pursuant to 28 U.S.C. § 1441.

Both parties moved for summary judgment on all claims and the matter was heard on September 8, 1989. At the conclusion of the hearing, the District Court granted the city's motion for summary judgment and denied plaintiff's cross motion. A judgment was filed November 15, 1989. App. B. This appeal was taken only as to the takings claim based on the federal Constitution.

After briefing and oral argument, the United States Court of Appeals for the Ninth Circuit on August 7, 1991, entered its decision upholding the District Court judgment. Judge Beezer wrote a dissent from the panel decision. Plaintiff's petition for rehearing with suggestion for rehearing *en banc* was denied on January 7, 1992.

B. The Case

This lawsuit challenges Ordinance No. 89-013, adopted by the City of Sacramento on March 7, 1989. The ordinance requires, as a condition to issuance of certain commercial-use building permits, that a fee be paid to the city.[1] App. D (Ordinance No. 89-013, Section III.D.(1)).

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[1] The amount of the fee is calculated on a per-square-foot basis and varies depending on the type of commercial project proposed. For example, office space is assessed a fee of $.95 per square foot whereas retail space is charged $.75 per square foot. The other categories of commercial-use projects identified in the ordinance are hotel, research and development, manufacturing, and warehouse. App. D-32.

The purpose of the fee is to finance a special fund (the Housing Trust Fund) to provide low-income housing units in the city. App. D-12.

It is well settled that exactions imposed as a condition to receiving a development permit can result in a regulatory taking in violation of the Fifth Amendment. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The takings test applied in *Nollan* was whether the permit condition " 'substantially advance[s] legitimate state interests.' " *Id.* at 834. Under this test, exactions are legitimate only if they mitigate a need or burden *caused by* the development project. *Id.* at 835-36; *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (must have a "cause-and-effect relationship between the property use . . . and the social evil"). In the absence of a cause-and-effect relationship, or "essential nexus," the permit condition is not a legitimate regulatory action but a means of "extortion" which works a taking in violation of the Fifth Amendment. *Nollan*, 438 U.S. at 837.

The petitioner, Commercial Builders of Northern California (CBNC),[2] recognizes that providing low-income housing opportunities to needy people in Sacramento may be a legitimate and worthy objective for local government to pursue. However, CBNC contends that achieving this objective by raising money through building permit fees is an attempt to single out property

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[2] CBNC is an unincorporated association whose members are in the building profession or are owners and developers of real property intended to be developed for nonresidential uses in the City of Sacramento. Complaint at Paragraph 9.

owners to bear the costs of social programs. Petitioner argues that such cost shifting through an exaction of fees amounts to a leveraging of the permitting authority which violates Takings Clause principles as enunciated in *Nollan* and *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The city's theory for justifying the housing fee is that commercial-use projects, once built, will be occupied by businesses which will employ an estimated number of low-income wage earners. The city commissioned Keyser Marston Associates, Inc. (KMA), which produced a report estimating the number of low-income jobs typically located within various types of commercial and industrial development. App. E-3 through E-4. Since these jobs are new to the area, the assumption is that these opportunities will be filled by new low-income workers who migrate to the Sacramento region. App. E-5. Since the increased population of low-income workers will also need housing, the city claims that there is a "nexus" or "association" between commercial-use projects and an increased need for low-income housing. The city argues that this alleged nexus is sufficient to support the housing fee exaction.

The Ninth Circuit below stated that a permit condition may constitute a taking *"only* where the condition lacked *any rational relationship* to the project." App. A-4 (emphasis added). The court then upheld the fee by ruling that there was a "rational relationship" between commercial buildings and the city's need for low-cost housing. App. A-5. The court rejected petitioner's argument that the "substantially advance" standard of *Nollan* requires a closer nexus than a mere rational relationship.

"[W]e are not persuaded that *Nollan* materially changes the level of scrutiny we must apply." App. A-6. The Ninth Circuit further ruled that it was not necessary to show that commercial projects are directly responsible for the social ill that the exaction is designed to alleviate. App. A-7. Accordingly, even though builders do not cause people to be poor, and thus are not responsible for the economic condition which causes people to need low-cost housing, the court below nevertheless held that commercial builders may be singled out to pay a special fee to the city, as a housing subsidy, in order to be granted a permit to build on their property.

Judge Beezer dissented from the panel's decision. In his view, the city failed to establish the kind of cause and effect relationship required by this Court's precedents to justify a fee exaction. Judge Beezer characterized Sacramento's ordinance as "a transparent attempt to force commercial developers to underwrite social policy." App. A-11 (Beezer, J., dissenting). Beezer warned that "state and local governments have begun to stretch the use of exactions to the breaking point." *Id.* at App. A-13.

This case focuses on the need to set limits on how far the nexus rationale may be extended in requiring property owners to pay an increasingly burdensome array of permit fees. It also squarely presents the question of whether *Nollan*'s "substantial advancement" standard requires a closer degree of scrutiny of exaction schemes under the takings analysis than the rational basis review applicable in due process cases.

REASONS FOR GRANTING THE WRIT

I

THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL QUESTIONS THAT SHOULD BE RESOLVED BY THIS COURT

A. The Precedent Established by the Decision Below Throws the Door Wide Open to a Whole Array of Creative New Development Fees to Address General Social Concerns

By employing only a rational basis test, the Ninth Circuit would allow Sacramento to condition building permits on payment of housing fees on the mere grounds that development is associated with a growing population. However, the fact that development occurs as the city's population increases does not mean that development causes population growth. *See* KMA report at App. E-9. Nevertheless, the decision below links commercial development to the housing needs of new residents. By so ruling, the decision below also links development to any and all kinds of other necessities and public services needed by a growing population. The ramifications of allowing such a broad connection were recognized by Judge Beezer in dissent.

> "[N]ew workers . . . will increase the demand for all manner of goods and services. If Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health care delivery systems." App. A-14 (Beezer, J., dissenting).

The panel decision swings the door wide open to a whole host of creative new developer fees since any new development can be "linked" to population increases in some manner. If this "nexus" is sufficient to allow government to require builders to pay fees for housing subsidies for new residents, builders can also be required to pay fees for all types of other public goods and services.

Before this Court allows a conclusion which singles out landowners for the cost of underwriting social programs on the basis that development is accompanied by population increases, this Court should carefully consider whether the City of Sacramento has indeed stretched "the use of exactions to the breaking point." App. A-13 (Beezer, J., dissenting).

These concerns are not hollow portends. Already, other examples of social program development fees are emerging. For example, Sacramento is now considering an ordinance to impose child care fees as a condition to development.[3] Los Angeles has recently adopted ordinances creating an Arts Development Fee and Trust Fund which requires developers to pay the city up to 1% of their building valuation as a condition of approval.[4] In Honolulu, Mayor Fasi has proposed requiring golf course developers to pay huge fees, reportedly $100 million, to support public low-income housing projects.[5] In

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[3] Steve Sebelius, *Developers Don't Want to Fix Social Ills*, Sacramento Union, Aug. 10, 1991, at A1, A8.

[4] City of Los Angeles Ordinance No. 166,724 and No. 166,725 enacted March 8, 1991.

[5] Bill Wood, *Politics in the Marketplace*, Hawaii Investor, Aug. 1991, at 39, 40.

San Diego, an initiative is being circulated that will require development fees to supplement the city police department in launching an anticrime campaign.[6] And Los Angeles politicians are carefully watching the final outcome of the case at bar. They are preparing to adopt a housing fee exaction modeled after Sacramento's ordinance, but the big difference is that Los Angeles proposes to charge office developments a housing fee upwards of $6.00 per square foot![7]

Perhaps the most dramatic indication of just how far the "nexus" rationale is being stretched is in the farming town of Greenfield, California. Located in Salinas Valley, this small town now requires residential developers to include two bicycles with each newly constructed house. The nexus?--new development is associated with increased air pollution and, of course, bicycle use reduces air pollution. *See Town Pledge: 2 Bikes in Every Home*, Sacramento Union, Feb. 20, 1992, at A5. The requirement has been imposed on at least two new development projects even though the Greenfield mayor admits: " 'I don't know whether they'll use the bikes or hock them and take the money and run. But at least we're doing something about this brown air in Salinas Valley.' " *Id.*

It is both comical and frightening to realize that government regulators can employ the nexus rationale to justify such a conclusion. It is also sobering to realize that

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[6] Lori Weisberg, *Plan Will Circulate Anti-Crime Initiative*, San Diego Union, Jan. 7, 1992, at B1.

[7] *Some Good, Some Bad Building Blocks in Mayor's Plan*, Downtown News, Aug. 26, 1991, at 4; Michael Berger, *Bradley Plan Would Pick Wrong Pockets*, L.A. Times, Aug. 18, 1991, at M5.

the link between houses and air pollution is probably more direct than the link between commercial development and the low-income housing needs of workers who may or may not be employed within commercial buildings. The precedent below does indeed stretch the nexus analysis *beyond* the breaking point.

People will always need a place to live. If constructing a building is accepted as a sufficient nexus to impose responsibility on the builder to also provide housing subsidies for workers within those buildings, then how far can the analysis go before it stops? What social programs are not more or less linked to population growth which, in turn, may be associated with commercial and residential development? The decision below sets a far-reaching and dangerous precedent by allowing permits to be held hostage until the applicant agrees to fund some social objective unrelated to the direct or substantial consequences of the proposed project.

B. The Question of How Far Development Fees Can Reach in Addressing Social Concerns Is a Question of Great Importance Nationwide Which Should Be Answered by This Court

One indicator of the national significance of the decision below is the widespread media coverage which the decision has generated. Coverage includes national newspapers,[8]

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[8] *Fee Fever*, Wall St. J., Sept. 16, 1991; Stephen Chapman, *A City Pays for Social Programs by Fleecing Newcomers*, Chi. Trib., Oct. 13, 1991, at 3; Henry Weinstein, *Court OKs Fee on Builders to Pay for Housing*, L.A. Times, Aug. 8, 1991, at A1; Michael Berger, *Bradley Plan Would Pick Wrong Pockets*, (continued)

trade journals,[9] legal newspapers,[10] and local newspapers from around the country.[11]

The national significance is more than just media hype. In its recent report to President Bush and Secretary

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L.A. Times, Aug. 18, 1991, at M5; Lynn Ludlow, *Developers' Low-Cost Housing Fee Survives Appellate Court Threat*, S.F. Examiner, Aug. 8, 1991; Cooper and Delsohn, *Court OKs Making Developers Aid Low-Income Housing*, Oakland Trib., Aug. 8, 1991; *Fees on Developers Upheld but Sacramento Housing Case Expected To Be Appealed*, Honolulu Star-Bulletin & Advertiser, Aug. 25, 1991, at A35.

[9] Pete Barlas, *Guess Who Pays for Growth, Court Ruling Rocks Industry*, Cal. Real Estate J., Sept. 15, 1991, Vol. 1, No. 13, at 1; Mike Silva, *High Fees for Low Income*, Real Estate Week, Western Edition, July 9, 1990, at 1; *Cal. Land Use Law & Policy Reporter*, Oct. 1991, at 35; Sigfredo Cabrera, *Federal Appeals Court Upholds Developer Fees for Low Income Housing*, BIA Builder, Oct. 1991, at 25.

[10] Michael Berger, *Developers Get Treated Like Fish in a Barrel*, L.A. Daily J., Aug. 29, 1991, at 5; Philip Carrizosa, *Developers Must Pay for Low-Income Housing*, S.F. Banner Daily J., Aug. 8, 1991, at 1; *also printed in* L.A. Daily J., Aug. 8, 1991, at 1.

[11] Bruce Lee, *Housing Trust Fund a Dangerous Form of Taxation*, Sacramento Union, Aug. 16, 1991; Steven Chapman, *When City Fees Become Matter of Extortion*, Colorado Springs Gazette Telegraph, Oct. 19, 1991; *also printed in* La Habra Daily Star Progress, Oct. 17, 1991, *and* San Clemente Sun Post, Oct. 14, 1991; *Mistrustful Funding*, Turlock J., Aug. 19, 1991; *Another Tax on Jobs*, Woodland Hills Daily News, Aug. 16, 1991; *Unreal Estate*, Orange County Register, Aug. 13, 1991; *Low-Income Housing Gets Legal Boost*, San Jose Mercury-News, Aug. 8, 1991, at 5B; *New Builder Fees Threaten Property Rights*, Acton/Agua Dulce News, July 15, 1991, at 2; Philip Carrizosa, *Circuit Panel Upholds Developers Fee*, Santa Rosa Herald Recorder, Aug. 27, 1991.

Kemp, the Advisory Commission on Regulatory Barriers to Affordable Housing identifies the problems presented to affordable housing by increasingly large development fees. *See "Not in My Backyard," Removing Barriers to Affordable Housing*, Executive Summary at 3. The Commission recommends that impact fees be used only to fund facilities that "directly serve" or are "directly connected" to the proposed development. Executive Summary at 13, Recommendation 7-10.

It is ironic that Sacramento's goal of improving the city's supply of low-cost housing has resulted in legal precedent which, if allowed to stand, opens the door to even more fees, including fees on residential development, thus ultimately making the goal of affordable housing even more difficult to achieve.

The significance of the precedent below is also reflected by its impact on the democratic process. The precedent authorizes a shift toward using development fees to achieve wealth transfers that otherwise could not withstand the public scrutiny and accountability of paying for such transfers through taxes. By compelling wealth transfers "off budget" with relative invisibility, the normal democratic process is circumvented and thereby undermined. *Pennell v. City of San Jose*, 485 U.S. at 21 (Scalia, J., dissenting). Of course, achieving such wealth transfers through means other than taxes should not be permitted. As Judge Beezer explained, Sacramento "legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden." App. A-11 (Beezer, J., dissenting).

C. The Precedent Established by the Decision Below Conflicts with Applicable Decisions of This Court

1. The Ninth Circuit Has Sanctioned a Nexus Standard Which Disregards the Necessary Cause-and-Effect Relationship Required to Impose Permit Conditions

This was an appeal from a grant of summary judgment. The Ninth Circuit only needed to determine whether there was a triable issue of material fact. In concluding that there was no triable issue of fact the Ninth Circuit has ruled, as a matter of law, that the nexus analysis employed here was adequate to satisfy constitutional standards.

However, the nexus approved of by the Ninth Circuit is one which utterly fails to establish a cause-and-effect relationship between proposed projects and the public harm which the permit condition is designed to alleviate. Indeed, the nexus analysis conducted by Keyser Marston Associates, Inc., did not even attempt to establish that commercial development causes a migration of low-income workers to Sacramento. Rather, the so-called nexus analysis contained in the report is nothing more than an estimate, on a per square foot basis, of the number of low-income workers that typically are employed in various types of commercial and industrial buildings. *See* KMA report at App. E-3 through E-4 (chart summarizing numerical data).

The report even admits that it does not establish a cause-and-effect relationship. Under the heading "Responsibility for Growth," the report acknowledges:

> *"The nexus analysis does not make the case that building construction is responsible for growth.* Clearly many factors come into play in determining what makes a region grow. At best, it can be said that the production of buildings to accommodate growth is but one of many factors that enable or contribute to its occurrence." App. E-9 (emphasis added).

The report further concedes that there are *"major questions and issues* about accounting for the growth of very low-income households in a growing economy." App. E-3 (emphasis added).

The Ninth Circuit nevertheless upheld summary judgment and did so despite a declaration submitted in opposition to the city's motion for summary judgment which showed that instead of commercial construction causing an influx of workers, the exact opposite occurs, *i.e.*, employers follow the work force. App. F-3 (Declaration of David Wade). In reaching its conclusion, the Ninth Circuit necessarily adopted, as a matter of law, the view that a sufficient nexus exists between commercial buildings and low-income housing needs even though there is no showing of a cause-and-effect relation between those occurrences.

The court appeared to try to soften the unfairness of its decision by suggesting the Sacramento ordinance "accounts for the indirectness of the connection" by charging developers "only a small percentage" of the total low-income housing needs in the city. App. A-10.

But if only a minor and indirect nexus exists, as the court's reasoning appears to concede, *then no exaction at all can be justified. Nollan* requires that there be a *substantial connection* between the project and the identified public problem. At best, the rationale of the court below, while attempting to demonstrate that some small fee may be charged, actually demonstrates that the connection in this case is not sufficient at all to justify placing this condition on permit applicants.

2. As a Matter of Law, Commercial Builders Are Not Responsible for the Economic Well-Being of People Who Work in Buildings They Construct and, Therefore, Builders Cannot Be Singled Out to Pay a Special Burden to Provide a Public Housing Subsidy

As a matter of law, commercial builders should not be held legally responsible, through building permit exactions, for the housing needs of the city's populace. Even if one assumes, arguendo, that commercial development is, to some degree, a factor in attracting low-income workers to the Sacramento area, this linkage is too remote and indirect to justify imposition of this fee. To impose a fee, there must be an *element of responsibility* that arises because of a substantial cause-and-effect relationship. But commercial-use buildings are not the cause of Sacramento's need for low-income housing. Rather, the need for low-income housing occurs because some people are poor. But commercial developers do not cause people to be poor.

Although the majority in *Pennell* found the takings claim not ripe (and therefore did not reach the merits of

that claim), Justices Scalia and O'Connor dissented on the ripeness issue and went forward to address the merits of the takings claim. The reasoning of the dissent, which was not controverted by the majority, explained why property owners are not responsible for the economic hardships and housing concerns of the working poor.

> "[T]he 'hardship' provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But *that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, *or the employers who pay them their wages*, or the citizens of San Jose holding the higher paying jobs from which they are excluded. *Pennell*, 485 U.S. at 21 (Scalia, J., dissenting) (emphasis in original; emphasis added).

Similarly, commercial builders are not responsible for the problem of workers who cannot afford market rate housing. That problem must be addressed by the city through means other than special development fees on commercial projects.

> "The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes . . . . Unless we are to abandon the guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,' this is the only manner that our Constitution permits." *Id.* at 21-22 (citations omitted).

The present case is no different. Just as the landlords in *Pennell* are not responsible for the economic conditions of their particular tenants, similarly, commercial builders are not responsible for the economic condition of workers who will occupy those buildings.

If it is to mean anything at all, the nexus concept must include an element of responsibility similar to the "duty" concept (sometimes referred to as proximate cause) applied in tort law. Just as liability in tort law may be cut off for consequences that are too remote or indirect, similarly, builders should not be held liable for public needs which are only remotely or indirectly connected to projects. The "substantially advance" test of *Nollan*, as well as the "fairness and justice" principles underlying the Takings Clause (*see Armstrong*, 364 U.S. at 49), provide ample authority. By using a mere rational relationship type of test, the Ninth Circuit removes the element of responsibility which must be present in order to require a property owner to solve a public problem.[12]

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[12] It should be noted that requiring a substantial cause-and-effect relationship does not invalidate traditional subdivision conditions. Judge Beezer explained that traditional on-site improvements (*e.g.*, sewers, water mains, sidewalks, curbs, and gutters) as well as off-site improvements (*e.g.*, roads, schools, parks, and sewage treatment plants), are generally upheld. In those cases, the requirement "solves a problem actually created by the development." App. A-12 (Beezer, J., dissenting). The Sacramento ordinance is further distinguished by the fact that the housing fee does not directly benefit or service the development.

> "Sacramento would have developers pay not just for public improvements necessitated by development, but for private subsidies with little or no causal connection to development. *Not surprisingly, under a scheme requiring no connection, no benefit accrues to the development in return.*" *Id.* at A-13 (emphasis added).

II

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING THE DEGREE OF SCRUTINY IN TAKINGS/EXACTION CASES

A. The Ninth Circuit Ruling Conflicts with Precedent Set by This Court in Nollan

In *Nollan* this Court ruled that the takings analysis involves a greater degree of judicial scrutiny than is applicable in due process and equal protection challenges. The Court pointed out that under the takings analysis a regulation must " 'substantially advance' the 'legitimate state interest[s],' " rather than be rationally related to those interests. *Nollan*, 483 U.S. at 834 n.3. This Court further emphasized that the abridgement of property rights requires a " '*substantial* advanc[ing]' " (*id.* at 841, emphasis by the Court) and that the Court is "inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* at 841.

Legal commentators have recognized that this aspect of *Nollan* is perhaps its greatest significance.[13] Yet, the

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[13] *See, e.g.*, Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 Neb. L. Rev. 186, 210 (1991) ("[i]t was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with (continued)

decision below relies on pre-*Nollan* and other inapplicable cases to support a view that a permit condition challenged under the Takings Clause need only satisfy rational basis review. The court expressly rejected petitioner's contention that *Nollan*'s substantial advancement standard requires a closer degree of scrutiny. "We are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to the Ordinance." App. A-6. But the Ninth Circuit's conclusion is directly contrary and irreconcilable with the express language of this Court in *Nollan*.

B. The Decision Below Conflicts with Interpretations of Nollan by Both Federal and State Courts

The Ninth Circuit's application of a rational basis standard of review is directly contrary to interpretations of *Nollan* provided by New York and California courts. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y. 1989) (challenges of this sort require " 'semi-strict or heightened judicial scrutiny of regulatory means-ends relationships' as articulated in *Nollan*"); *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d

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a takings analysis . . . that marks the importance of the *Nollan* case"); Robert K. Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions*, 10 Zoning & Planning L. Report 152, 156 (Oct. 1987); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. Colo. L. Rev. 599, 613 (1991); Craig A. Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 338 (1988); *The Supreme Court 1986 Term: Leading Cases*, 101 Harv. L. Rev. 119, 247-49 (1987).

1260, 1270 (1991) ("*Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as a 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls") (emphasis in original; footnotes omitted).

The decision below also conflicts with other Federal Circuit Court opinions. In contrast to the rational basis test applied by the court below, a different panel from the same circuit has more recently recognized that *Nollan* does require a "close analysis" in takings cases. *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582-83 (9th Cir. 1991) ("relationship between the means and the ends must be closer for purposes of takings clause analysis" than due process analysis; "[w]e interpret *Nollan* as holding that in cases brought under the takings clause we must undertake a close analysis of the means of protecting the asserted governmental interest").[14]

In short, the decision below places itself directly at odds with the clear language of *Nollan* and with judicial interpretations of *Nollan*. Unfortunately, this split of authority will create substantial confusion for lower courts. Indeed, the case at bar is already having just such

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[14] The First Circuit, although not reaching the issue, has also recognized that *Nollan*'s takings analysis may be different from the rational basis review applicable in due process cases. *Tenoco Oil Co., Inc. v. Department of Consumer Affairs*, 876 F.2d 1013, 1020-21 (1st Cir. 1989). *See also McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989) (recognizes *Nollan* as applying strict scrutiny); *Boone v. United States*, 725 F. Supp. 1509, 1523 (D. Haw. 1989) (*Nollan* "puts an increased burden on the Corps to justify its actions").

an impact. In *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992), the California Court of Appeal was confronted with, on one hand, the decision of its sister Court of Appeal in *Surfside Colony* (where *Nollan* was interpreted as requiring a heightened level of scrutiny) and, on the other hand, with the case at bar (where heightened scrutiny was rejected). In an apparent effort to reconcile the conflict, the *Blue Jeans Equities* court ends up holding that "any heightened scrutiny test contained in *Nollan* is limited to *possessory* rather than regulatory takings cases." *Id.* at 171 (emphasis added).

Of course, in a possessory taking case *no scrutiny at all* is required. Such cases are per se takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Moreover, *Nollan* was not a possessory taking case but was a regulatory taking case which analyzed whether the government's regulation, in the form of a permit condition, violated the regulatory takings test set forth in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation effects a taking if it fails to substantially advance legitimate state interests). To rule that *Nollan* establishes heightened scrutiny in *possessory* takings cases makes no sense at all.

The *Blue Jeans Equities* opinion illustrates that the decision below will produce ever more confusing decisions which can only lead to strained and incorrect interpretations of this Court's takings jurisprudence.

C. The Heightened Scrutiny Issue Is an Important Question of Law Which Should Be Resolved by This Court

Applying the correct degree of scrutiny is critical to the ability of lower courts to properly conduct a takings determination. Indeed, the level of scrutiny is the key factor in determining whether the Takings Clause provides protection to property owners from government exaction schemes. This is aptly illustrated by the decision below where application of a rational basis level of review easily led to a decision upholding the fee exaction even though the alleged nexus, at best, is tenuous and speculative. Any close examination of the substance of the Keyser Marsten report bears out that a cause and effect nexus does not exist.

This Court in *Nollan* characterized the coastal commission's abuse of its permitting authority as extortion and a leveraging of the police power. *Nollan*, 483 U.S. at 837. How are courts to ferret out such abuses of the permitting authority if they do not look closely at the *substance* underlying government action? The present case, like *Nollan*, illustrates the need for some form of heightened scrutiny. Resolving the split of authority concerning the appropriate degree of scrutiny under the Takings Clause is of exceptional importance and merits review by this Court.

III

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY WITH STATE COURTS OF LAST RESORT REGARDING RESPONSIBILITY FOR LOW-INCOME HOUSING

The decision below is directly contrary to decisions of the highest courts of Washington and New York. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059, and *San Telmo Associates v. City of Seattle*, 108 Wash. 2d 20, 735 P.2d 673 (Wash. 1987). Those cases recognize that a low-income housing shortage is a social problem which cannot be addressed by shifting the costs onto the backs of those who wish to develop their properties. The New York court specifically recognizes that the nexus between development and the social problem of housing low-income people is too indirect and tenuous to justify imposing a housing fee on developers. *Seawall Associates*, 542 N.E.2d at 1062. The direct conflict presented by these holdings on such a significant issue should be resolved by this Court.

At issue in *San Telmo* was a Seattle ordinance which conditioned demolition of low-income residential units on payment of a fee to help finance a city housing fund. The city argued that the fee requirement was "merely a regulation on development." *See San Telmo*, 735 P.2d at 674. The Washington Supreme Court responded:

> "Quite simply, the municipal body cannot shift the social costs of development on to a developer under the guise of a regulation.
>
> . . . .
>
> "We sympathize with the problem created by the low income housing shortage in the city

> of Seattle. However, the City must cure this problem by the lawful exercise of powers granted to it by the constitution and the Legislature. The City can ameliorate this housing shortage by legitimate rezones or, as it has recently done, by passing a multimillion dollar levy on all property owners in Seattle. Nevertheless, the City may not constitutionally pass on social costs of development of the downtown Seattle area to current owners of low income housing. The problem must be shared by the entire city, and those who plan to develop their property from low income housing to other uses cannot be penalized by being required to provide more housing." *Id.* at 675.

The case in New York is also strikingly parallel to the one here. The attempt in New York, like Seattle, was to impose a special burden on property owners in the form of a buy-out fee as a condition to converting single-room occupancy [SRO] dwellings to another use. The purpose of the fee was to provide housing for the homeless. After carefully analyzing this Court's precedent, including *Nollan*, the New York court concluded that the takings issue there, "as in any case," was whether the individual property owners were being forced "to bear more than a just share of obligations which are rightfully those of society at large." *Seawall Associates v. City of New York*, 542 N.E.2d at 1062. The court held:

> "[T]he nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property

owners to bear the costs required by the law toward the cure of the homeless problem. Indeed, by equating the 'cure' with dollars . . . the terms of Local Law No. 9 itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole." *Id.* at 1069.

CONCLUSION

Sacramento's ordinance is intended to transfer wealth from those who desire to develop commercial properties to those who have below average incomes. But providing economic assistance to the needy is a responsibility of society as a whole. Property owners who desire legitimate use of their lands—reasonable and beneficial uses which meet all standards for approval—should not be singled out to finance the costs of providing housing for the needy. They do not cause people to be poor, nor are the economic hardships a consequence of their desire to develop their properties.

In upholding Sacramento's scheme, the Ninth Circuit has overlooked the very purpose of the Takings Clause. That purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 227 (1986); *Nollan*, 483 U.S. at 835 n.4. This case falls squarely within this guiding principle which has been referred to by this Court as "axiomatic." *First English Evangelical Lutheran Church of*

Glendale v. County of Los Angeles, 482 U.S. 304, 318-19 (1987). Yet, the Ninth Circuit ignored it completely.

This oversight of the essential purpose of the Takings Clause, especially when combined with application of a mere rational basis standard of review, is the real vice of the decision below. The result is to uphold a fee exaction which, as Judge Beezer recognized, is really an attempt to saddle property owners with a community burden.

This case has been closely watched by property owners and builders who are already heavily burdened with an array of permit conditions and fee exactions. The precedent now established stretches the exaction rationale "to the breaking point." App. A-13 (Beezer, J., dissenting). The extent to which builders can be subjected to creative new fees for social programs is an issue of exceptional importance and wide-ranging impact.

The petition should also be granted to resolve the split of authority regarding the applicable level of scrutiny in takings/exaction cases. Without further guidance from this Court, the conflicting authorities will lead to still further confusion and inconsistent results.

Petitioners respectfully urge this Court to grant the petition for writ of certiorari.

DATED: March, 1992.

Respectfully submitted,

RONALD A. ZUMBRUN
EDWARD J. CONNOR, JR.
*JOHN M. GROEN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Petitioner

APPENDIX A*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members, *Plaintiffs-Appellants,* v. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, *Defendants-Appellees.*	No. 89-16398 D.C. No. CV-S-89-638-EJG OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
March 12, 1991 – San Francisco, California

Filed August 7, 1991

Before: Mary M. Schroeder, Robert R. Beezer and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Schroeder; Dissent by Judge Beezer

OPINION

SCHROEDER, Circuit Judge:

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* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

INTRODUCTION

Commercial Builders appeals the district court's grant of summary judgment in favor of the City of Sacramento in Commercial Builders' suit challenging a city ordinance to help expand available low income housing. The Ordinance in question conditions certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low-income workers who move there to fill jobs created by the project in question. Appellants are a group of commercial developers who filed suit contending the ordinance constitutes a taking under the fifth and fourteenth amendments.

The district court granted summary judgment in favor of the city, holding that the Ordinance did not effect an unconstitutional taking. It specifically found that the Ordinance substantially advanced a legitimate interest and that the city had adequately supported its contribution requirement by showing a sufficient nexus between nonresidential development and the demand for low-income housing. The court therefore concluded that the ordinance was not infirm under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which requires such a nexus between land use restrictions and the articulated purpose behind them. Because we agree that the Ordinance here at issue does not amount to an unconstitutional taking, we affirm.

DISCUSSION

In 1987, the City and County of Sacramento commissioned a consulting firm, Keyser-Marston Associates, to

study the need for low-income housing, the effect of nonresidential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such development to pay for such housing. Keyser-Marston submitted its report, estimating the percentage of new workers in the developments that would qualify as low-income workers and would require housing. As instructed, it also calculated fees for development based on a yearly subsidy of $12,000 per qualified household that would be connected to the development. This figure represented the difference between $42,000, the minimum cost of building a two-bedroom apartment, and $30,000, the maximum rental income expected from a low-income household. Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced its final calculations by about one-half.

Based upon this study, the City of Sacramento enacted the Housing Trust Fund Ordinance on March 7, 1989. The Ordinance list several city-wide findings, including the finding that nonresidential development is "a major factor in attracting new employees to the region" and that the influx of new employees "create[s] a need for additional housing in the City." Pursuant to these findings, the Ordinance imposes a fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs. The fees, calculated using the Keyser-Marston formula, are to be paid into a fund to assist in the financing of low-income housing. The city projects that the fund will raise about $3.6 million annually, nine percent of the projected annual cost of $42 million for the needed housing. Additional

money will come from other sources, such as debt funding and general revenues.

Commercial Builders does not argue that the city lacks a legitimate interest in expanding low-income housing. Rather, it contends that this Ordinance constitutes an impermissible means to advance that interest, because it places a burden of paying for low-income housing on nonresidential development without a sufficient showing that nonresidential development contributes to the need for low-income housing in proportion to that burden. We affirm because we find the Ordinance sufficiently related to the legitimate purpose it seeks to achieve.

We have held that a condition placed upon the granting of a permit to develop land may constitute an impermissible taking, but we have done so only where the condition lacked any rational relationship to the project for which the permit was sought. In *Parks v. Watson,* 716 F.2d 646 (9th Cir. 1983), we held that where a developer seeking vacation of platted streets offered to pay for such vacation, a city could not insist that the developer dedicate its geothermal wells to the city as a precondition for such vacation. The dedication requirement, we held, "had no rational relationship to any purpose related to the vacation of the platted streets." 716 F.2d at 653. The condition therefore violated the fifth amendment.

We noted in *Parks* that the analysis we applied was based upon a consensus among the states that had considered the constitutionality of subdivision exaction regulations. 716 F.2d at 653. Prior to *Nollan,* other federal courts similarly upheld ordinances placing restrictions or conditions upon development where the ordinances were

reasonably related to legitimate public purposes. *See, e.g., Rogin v. Bensalem Township*, 616 F.2d 680, 690-92 (3d Cir. 1980), *cert. denied sub nom. Mark-Garner Associates v. Bensalem Township*, 450 U.S. 1029 (1981); *Maher v. City of New Orleans*, 516 F.2d 1051, 1064-67, *reh'g denied*, 521 F.2d 815 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1031-32 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979). Under this analysis, the Ordinance here at issue cannot be said to work an unconstitutional taking. It was enacted after a careful study revealed the amount of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development. It assesses only a small portion of a conservative estimate of the cost of such additional housing. The burden assessed against the developers thus bears a rational relationship to a public cost closely associated with such development.

The appellants contend that, even if the Ordinance would pass constitutional muster under these principles, it must be struck down because the Supreme Court has now articulated a more stringent standard under which courts must analyze the imposition of conditions upon development. The appellants point out that in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the Court held that such conditions must not only be ones that the government might "rationally have decided" to employ for a given legitimate public purpose; they must also substantially advance such a purpose. *See* 483 U.S. at 834 & n.4. They argue that under the standard articulated in

Nollan, an ordinance that imposes an exaction on developers can be upheld only if it can be shown that the development in question is directly responsible for the social ill that the exaction is designed to alleviate.

As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance. The *Nollan* Court specifically stated that it did not have to decide "how close a 'fit' between the condition and the burden is required," because it found that the regulation in question "d[id] not meet even the most untailored standards." 483 U.S. at 838. It also noted that its holding was "consistent with the approach taken by every other court that has considered the question," citing *Parks* as the lead case in its string cite. *Id.* at 839. Other circuits that have considered the constitutionality of ordinances that placed burdens on land use after *Nollan*. None have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. *See, e.g., St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357 n.6 (2d Cir. 1990), *cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 111 S. Ct. 1103 (1991); *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir. 1988); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 178 (4th Cir. 1988). In keeping with this generally accepted view, we have recently reversed a district court's invalidation, under *Nollan*, of a requirement that a developer undertake off-site measures to mitigate harm to the environment, finding that that court had inappropriately required too close a nexus between the regulation and the interest at stake. *Leroy Land*

Development v. Tahoe Regional Planning Agency, No. 90-15364 (9th Cir. July ___, 1991), *rev'g Leroy Land Development Corp. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399 (D. Nev. 1990). We see no reason to depart from this view in this case.

We therefore agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. Where, as here, the Ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, the Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*. We find that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster.

The appellants also place some significance on the fact that this Ordinance is a fee provision. They contend that the fee represents a transfer of property, i.e., the money paid over to the city. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (treating a purely financial exaction as a taking). In this respect, they argue, it more closely resembles a physical taking of property, which automatically falls within the purview of the fifth amendment, than a land use regulation, which is subject to a reasonableness analysis. Under appellants' theory, however, compensation would be required for

every fee; therefore, every fee would be unconstitutional. We see no valid basis for such a rule.

Indeed, the only circuit court to treat a fee provision as an unconstitutional taking under *Nollan* was ultimately reversed by the Supreme Court. In *Sperry Corp. v. United States*, 853 F.2d 904 (Fed. Cir. 1988), the Federal Circuit found unconstitutional a government exaction of a percentage of any award from the Iran Claims Commission. It treated the fee as a physical taking because it constituted a transfer of the possession of property. 853 F.2d at 906-07. It then invalidated it because it found the exaction arbitrary. *Id.* at 908. The infirmity, the court held, was the assessment of the cost of the Iran hostage crisis only against those who successfully asserted claims associated with Iranian interests. Because that crisis was a national concern, the court concluded, the burden should instead have been borne equally by the whole nation. *Id.*

The Supreme Court disagreed, holding that the exaction of a percentage of any award made by the Iran Claims Commission was a permissible means of collecting reimbursement for costs incurred in the operation of that Commission. *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989). The Court expressed doubts as to the appropriateness of the Federal Circuit's analysis of the fee under principles applicable to physical takings, noting that "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." 110 S. Ct. at 395 n.9. Under this reasoning, the Ordinance does not, as appellants suggest, constitute a taking per se.

In *Webb's Fabulous Pharmacies*, 449 U.S. 155, upon which these appellants have also relied, the Court struck down a Florida statute that confiscated all interest on interpleader funds deposited with the state courts. The Court there reasoned that the statute in question served no purpose, because another Florida statute required that parties make payments for the services rendered by court personnel in maintaining such funds. 449 U.S. at 163-64. The appellants argue in this case that the Ordinance here at issue is similarly unrelated to a permissible purpose, contending that the mere desire to generate revenue for the public good cannot, after *Webb's Fabulous Pharmacies*, support the exaction.

The *Sperry* Court disposed of a similar argument. Its decision to uphold the deduction from awards was primarily based on the fact that the fee was used to pay for the operations of the tribunal that resolved the disputes of all of those from whom such a fee was collected; thus, a close nexus between the charge and the activity creating the cost was established. The Court indicated, however, that it would have been satisfied with an even looser nexus, stating that "Sperry may be required to pay a charge for the availability of the Tribunal even if it never actually used the Tribunal." 110 S. Ct. at 395-96. A purely financial exaction, then, will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed. Again, we conclude that the required nexus is present in this case.

Finally, the appellants contend that, regardless of the standard to be applied in assessing the validity of the Ordinance, they have raised an issue of material fact in

their attack on the conclusions of the Keyser-Marston study. This attack came in the form of an affidavit from their planner, David Wade, suggesting that commercial development may be a less decisive factor in worker migration than the Keyser-Marston study indicates. Wade concluded that, in addition to employment opportunity, the availability of low-income housing is itself partly responsible for any influx of low-income employees to Sacramento. Wade also opined that it is at least as true that employers follow the work force as the converse. This affidavit, appellants argue, sufficiently calls into question the city's findings concerning the nexus between its Ordinance and the social ill it sought to cure to preclude summary judgment.

The appellants' argument lacks merit. Even viewing the Wade affidavit in the light most favorable to the developers, it does not rebut the Keyser-Marston conclusion that commercial development is related to an increase in the need for low-income housing. The Ordinance accounts for what the developers characterize as the indirectness of the connection between the creation of new jobs and the need for low-income housing by charging only a small percentage of what the Keyser-Marston study calculated to be the cost of meeting new low-income housing requirements. As we have already noted, nothing in *Nollan* or any other authority cited by the appellants requires the nexus to be more direct than that achieved through the legislative process that the city here employed. We therefore agree with the district court that the Wade affidavit is insufficient to preclude summary judgment.

CONCLUSION

The district court correctly found that, as a matter of law. Sacramento's Housing Trust Fund Ordinance does not work an unconstitutional taking. Summary judgment in favor of the city was therefore proper.

AFFIRMED.

BEEZER, Circuit Judge, dissenting:

I respectfully dissent.

As Justice Scalia warned in *Nollan*, a state can leverage its police power to the point where a regulation of land use becomes an "out-and-out plan of extortion." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). Sacramento's ordinance is a transparent attempt to force commercial developers to underwrite social policy. Apparently, legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden.

Historically, courts have upheld exactions when states were able to justify them as serving a public purpose related to the burdens caused by development.[1] For example, courts have sustained requirements that developers construct various on-site improvements, such as sewers, watermains, sidewalks, curbs and gutters, storm

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[1] *See generally* Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Probs. 5 (Winter 1987).

drains, and landscaping. Requiring off-site improvements that serve a public purpose, such as roads, schools, parks and sewage treatment plants, may also be justified where the requirement alleviates a public burden or ameliorates harmful effects caused by the development. When the developer is asked to bear a fair share of the burden, such a requirement directly furthers the legitimate interests of the government. *See, e.g., Leroy Land Development v. TRPA,* No. 90-15364, slip op. at 8520 (9th Cir. July 9, 1991). When the governmental exaction solves a problem actually created by the development (for example, requiring the developer to provide needed infrastructure), it is no coincidence that the exaction results in a benefit to the development as well as the community.[2]

State and local governments face mounting budget deficits, attributable to decreased federal funding, recessionary pressures on tax collection and the growing popularity of "taxpayer revolts" – the most well-known example of which is California's Proposition 13.[3] In

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[2] *See, e.g., Hollywood Inc. v. Broward County,* 431 So.2d 606 (Fla. Dist. Ct. App.), *cert. denied,* 440 So.2d 352 (1983). Upholding a county ordinance requiring the dedication of land or payment of a fee to assist the county in acquiring and developing parks, the court noted that (1) the funds had to be expended within a reasonable time, (2) the funds had to be used to meet the need created by the development, and (3) the park system thereby provided would "substantially benefit the residents of the platted area." *Id.* at 612.

[3] Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices,* 50 Law & Contemp. Probs. 51, 51-52 (Winter 1987); Blaesser & Kentopp, *Impact Fees: The "Second Generation,"* 38 Wash. U.J. Urb. & Contemp. L. 55, 59 (1990).

response, state and local governments have begun to stretch the use of exactions to the breaking point.[4] Sacramento would have developers pay not just for public improvements necessitated by development, but for private subsidies with little or no causal connection to development. Not surprisingly, under a scheme requiring no connection, no benefit accrues to the development in return.

> It is no longer the case that exaction requirements are imposed only when the direct benefit to the land and extra costs to government created by development are demonstrable. Instead, exaction fees have approached . . . "grand theft," as the benefit to private landowners has become marginal, or in some cases, nonexistent, and the public need attributable to new development more tenuous and theoretical.

Smith, supra note 1, at 29 (footnotes omitted).

Sacramento has commissioned a study that demonstrates at best a tenuous and theoretical connection between commercial development and housing needs. But the Takings Clause requires a cause-and-effect relationship between the two. *Pennell v. San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting). In my view, Sacramento has not shown such a relationship. Even the study relied on by the city to support the ordinance states that its "nexus analysis does not make the case that building construction is responsible for growth."

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[4] Honolulu is considering an ordinance that would impose a similar low-income housing fee on golf-course developers. Cabrera, *Taxman, Spare That Golf Course*, Wall St. J., July 11, 1991, at A10, col. 3.

The ordinance is nothing more than a convenient way to fund a system of transfer payments. Although Sacramento attempts to justify the ordinance as an exercise of its police power, the city actually is exercising its taxing power – free of the encumbrances generally thought to limit the exercise of that power.

> The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities – a problem caused by the society at large – has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," this is the only manner that our Constitution permits.

Pennell, 485 U.S. at 21-22 (Scalia, J., dissenting) (citation omitted).

The new workers attracted by the new jobs associated with the new development surely will increase the demand for all manner of goods and services. If Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health-care delivery systems.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, AND ITS AFFECTED MEMBERS,

Plaintiffs and Petitioners,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20, inclusive,

Defendants and Respondents.

_____/

CIV. NO. S-89-638 EJG

JUDGMENT

(Filed Nov. 15, 1989)

This matter was before the court on September 8, 1989 for hearing on the parties' cross-motions for summary judgment on all causes of action. Joel S. Levy and Howard S. Nevins appeared on behalf of plaintiffs. Marc B. Mihaly, Kenneth Kimmell and E. Clement Shute, Jr. appeared on behalf of defendants. Timothy A. Bittle and John M. Groen appeared on behalf of *amicus curiae* Pacific Legal Foundation. Upon consideration of the submitted briefs and oral argument, good cause appearing therefore, and for the reasons stated in the courts oral analysis at the hearing, the court renders the following final judgment.

IT IS ORDERED that:

1. Defendants' motion for summary judgment on all causes of action is granted.

2. Plaintiffs' cross-motion for summary judgment on all causes of action is denied.

3. Defendants are referred to Local Rule 292 concerning their request for costs.

IT IS SO ORDERED.

DATED: November 15, 1989.

/s/ Edward J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD J. GARCIA,
U.S. DISTRICT JUDGE

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, AND ITS AFFECTED MEMBERS, Plaintiffs & Petitioners, vs. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20, inclusive, Defendants & Respondents.	NO. CIV. 89-638-EJG

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, SEPTEMBER 8, 1989

JAMES G. VINE, CSR, License No. 1515

. . . .

[p. 15] THE COURT: I'm going to ask defendant, prevailing party on these cross-motions, to prepare, first of all, a summary judgment, a summary order of judgment and submit that within ten days if you can, and then I'll give you more time to submit proposed findings

of fact and conclusions of law in support of your judgment.

I'll try to give you a brief overview of why I agree with most of the position you take in your briefs and disagree with the plaintiffs.

My notes may be out of sequence as far as your briefs are concerned, but I think I hit each of the causes of action in my oral analysis.

[p. 16] Regarding the first cause of action, I think it's the first cause of action, yes, for violation of California's Environmental Quality Act. This cause of action is pled in seven counts, each count alleging failure to comply with some aspect of the act. This tends to make the Complaint as to this cause of action somewhat confusing. However, the validity of the several counts hinges on whether an environmental impact report was required prior to the adoption of the ordinance, or whether a negative declaration was sufficient.

From the materials submitted, there is an absence of any substantial evidence that the fee imposed will cause a significant environmental effect.

I disagree with plaintiff's contention that the fee will cause "development slight." First of all, the fee is set lower than most surrounding jurisdictions and I believe it's low enough that it's doubtful that it alone would cause commercial developers to go to outlying areas outside the city.

Also, I agree with the defendants that the final environmental impact report on the city's general plan update considered everything that could be considered at the

time. The mere possibility of environmental effect is not sufficient to require and EIR, substantial evidence is required.

[p. 17] The California Supreme Court has held that an EIR must be prepared "where it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact."

In reviewing the agency's determination, the Court must determine whether substantial evidence supported the agency's conclusion as to whether the "fair argument" could be made.

Applying these standards, I believe that defendants properly determined that there was not sufficient evidence to make out a fair argument of a substantial environmental impact.

Regarding the second cause of action that the fee imposed by the ordinance constitutes a taking without just compensation in violation of federal and state constitutional provisions. I agree with defendants from the submittals that the city properly determined that there was a substantial nexus between new commercial development and increased demand for low income housing, based on the findings of the Keyser report they commissioned.

I also agree that the defendants' analysis of the Nollan case and the test it sets forth to determine if there was a taking.

Contrary to plaintiff's position, I do not believe [p. 18] that, or Nollan does not suggest that a regulation

constitutes a taking if an outright prohibition of the activity would constitute a taking. While Nollan does discuss whether an outright prohibition of the activity would be an unconstitutional taking, nothing in that decision or in any preceding or subsequent case brought to the Court's attention suggests that there is an additional test.

Generally, courts have recognized that land use regulation does not effect a taking if it substantially advances legitimate state interest and does not deny an owner economically viable use of his land. The Nollan case focused on the nexus between the burden imposed by the regulatory condition and the needs arising from granting a permit to the plaintiffs; such is also the focal point of the parties' debate in the case before me. I believe that defendants have established this nexus. Defendants' belief of this nexus is based on the Keyser report's finding of a clear link between the influx of commercial development and an increased need for low income housing. While plaintiffs attempt to chip away at the methodology employed by the Keyser report, plaintiffs seem to overlook that there is no requirement that the report be perfect; there is only a requirement that the above-mentioned test be met. Thus, the fact [p. 19] that the Keyser report was labeled, for example, "preliminary" is not that important. Keyser's recognition that certain parts of its analysis which were less than perfectly accurate, is also of little concern in the absence of some showing that these potential inaccuracies somehow skewed their conclusions. The fact that defendants only imposed fees that were fractions of the "true nexus" amounts found by the Keyser report indicates only that the defendant could have imposed a higher fee.

Finally, while it appears that the Keyser reports did combine county and city data, I do not believe that this potential concern makes defendant's reliance on an adoption of the Keyser finding irrational, particularly in light of the many areas in which the Keyser report frequently conservatively estimated its statistics with regard to the potential nexus.

As to plaintiff's contention that defendant's decision to impose the fee at the building permit stage rather than the occupancy stage destroys the nexus, I disagree. Several cases have upheld fees imposed at the time of the issuance of the building permit. See for example the Trent Meredith case cited by the defendants.

Regarding plaintiff's third cause of action, violation of equal protection under both the federal Fourteenth Amendment and state Article 1, Section 7, and [p. 20] Article 14, Section 16, of the California Constitution. Plaintiffs point to certain sections of the ordinance which treat developers in North Natomas differently than other city developers. Among other things, North Natomas developers are charged substantially lower fees and are provided with more flexible alternatives to fee payments than are other Sacramento developers.

The applicable standard for reviewing this ordinance is as follows: One, does the challenged legislation have a legitimate purpose? And, two, was it reasonable for the lawmakers to believe the use of the challenged classification would promote that purpose?

Plaintiffs concede that providing low income housing is a legitimate end; it contests whether these classifications would reasonably serve that end. Defendants'

evidence that North Natomas presently has a higher mix of low income housing than other areas of Sacramento in itself provides a rational basis for the disparate requirements of the ordinance. In addition, the fact that the City of Sacramento has already established fee and building requirements in North Natomas which preclude defendants from imposing additional housing or fee requirements on these developers, provides additional support for plaintiff's position.

Regarding the fourth cause of action for violation [p. 21] of California Constitution Article 13(a), Section 4, which requires pre-enactment voter approval prior to enactment of a special tax. The issue raised here is whether the fee on new commercial development imposed by the ordinance is a special tax as that term is used in Article 13.

Government Code Section 50076, enacted to implement the constitutional provision, further defines the term.

To prevail on this cause of action, plaintiffs must show that the fee is levied for general revenue purposes, which it incidentally it clearly is not; or that it exceeds the reasonable cost of providing the service for which the fee is levied. Plaintiff fails in this regard. The evidence submitted shows that the fee does not exceed the reasonable cost of meeting the low income housing needs of new employees created by new commercial development.

The Russ Building case cited by defendants appears to be dispositive on the issue.

Regarding the fifth cause of action for alleged violation of California Constitution Article 34, Section 1, which requires that low rent housing projects must be first submitted for approval to the voters of the city.

The evidence shows the ordinance in question was not submitted to the electorate.

[p. 22] Defendants first point out the plaintiffs have not complied with the procedural requirements in the California Code of Civil Procedure, a condition precedent to bringing this Article 34 challenge. Plaintiffs concede this and ask the Court to allow them to late file a publication of summons because they mistakenly believed it was not necessary in this action. In determining whether this mistake of law constitutes excusable neglect, I have considered that there was a case in point, the City of Ontario case cited by plaintiffs which should have put them on notice of the publication requirement because it was discussed there. I find plaintiffs were on notice and the mistake of law is not excusable.

In any event, in the alternative, I'd grant summary judgment to defendants on this cause of action on the merits pursuant to the Davis against Berkeley case both parties cite. I agree with the defendants' position in this regard that the facts that the Davis court states must be communicated to the voters, is not yet available. Submission to the voters would be premature and not required at this ordinance stage, by either the constitutional article or the Davis case.

Regarding the seventh cause of action pled, which alleges a violation of procedural due process. The essence of plaintiff's claim here is that the defendants [p. 23] were

biased in favor of the ordinance because the city was compelled by the North Natomas settlement agreement to adopt the ordinance without sufficient consideration.

In support of its positions, plaintiffs point to two statements made by one Steve Peterson and language from the initial study prepared by the city in its environmental review of the ordinance stated.

Plaintiffs evidence is insufficient to withstand summary judgment. The terms of the settlement do not compel the City Council to adopt this ordinance; plaintiffs do not claim that it does. The language in the statements submitted by plaintiffs in large part does not support plaintiff's contention that the City Council felt compelled to adopt the ordinance. To the marginal extent that it does, the evidence is insufficient to raise a genuine issue of material fact under Anderson against Liberty Lobby.

In the eighth cause of action in its Complaint, plaintiffs contend that defendants have violated Government Code Sections 66000 et seq. The dispute among the parties centers on whether the ordinance violates Government Code Section 66001 requiring that certain actions be taken by local agencies with respect to specific projects.

Plaintiff's suggestion that the statute requires [p. 24] defendants to provide a mechanism for a case-by-case analysis of the impact of specific projects I believe is mistaken. The statute merely sets forth the specific actions to be taken by the local agency when imposing the fee on a specific project. As argued by defendants, the section is clearly designed to address the implementation and operation of the fee, rather than its initial establishment.

It's for these reasons that plaintiff's motion for summary judgment is denied. Motion for summary judgment by the defendants is granted on all causes of action.

Could you tell me, Mr. Kimmell, how soon you could get the proposed findings before the Court?

MR. KIMMELL: Thirty days or sixty days, your Honor.

THE COURT: I'll assume you're going to serve a copy on the plaintiffs. I guess you want a copy, don't you?

MR. LEVY: Yes, your Honor.

THE COURT: I'll split the difference, 45 days.

MR. KIMMELL: Fine, your Honor.

THE COURT: I'd like the summary order within ten if you can do that.

Any questions?

MR. LEVY: No, your Honor.

MR. MIHALY: No, your Honor.

[p. 25] THE COURT: All right, thank you, counsel.

MR. KIMMELL: Thank you, your Honor.

[p. 26] REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

This is to certify that I was present in court as official court reporter during the proceedings had in the before-entitled case on Friday, September 8, 1989; that I reported in shorthand the proceedings had in said matter, and thereafter reduced my shorthand notes so taken to typewriting and the foregoing pages 3 to 25, inclusive, contain a full, true and correct statement and record of said proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, this 21st day of September, 1989.

/s/ James G. Vine
JAMES G. VINE
Certified Shorthand Reporter

APPENDIX C

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members, Plaintiffs-Appellants, v. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, Defendants-Appellees.	No. 89-16398 D.C. # CV-89-638-S-EJG (Eastern California) ORDER (Filed Jan. 7, 1992)
CITY AND COUNTY OF SAN FRANCISCO, Amicus.	

Before: SCHROEDER, BEEZER, and NOONAN, Circuit Judges.

Judges Schroeder and Noonan have voted to deny the petition for rehearing. Judge Beezer would grant the petition for rehearing. The panel has unanimously voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

ADOPTED 3/7/89

AMENDED
ORDINANCE NO. 89-013

ADOPTED BY THE SACRAMENTO CITY COUNCIL
ON DATE OF MAR 7 1989

AN ORDINANCE ADDING SECTION 33 TO THE COMPREHENSIVE ZONING ORDINANCE OF THE CITY OF SACRAMENTO, ORDINANCE NO. 2550, FOURTH SERIES, RELATING TO HOUSING TRUST FUND REQUIREMENTS FOR NON-RESIDENTIAL DEVELOPMENT PROJECTS (M87-086)

I. CITYWIDE FINDINGS

The Council of the City of Sacramento finds and declares as follows:

A. New office, commercial, research and development, manufacturing, industrial and warehouse uses hereinafter referred to as "non-residential uses" or "development projects" in the City of Sacramento have and continue to be a major factor in attracting new employees to the region. A substantial number of these employees and their families reside or will reside in the City of Sacramento. These new employees and their families create a need for additional housing in the City.

B. Traditionally these non-residential uses have benefited from a supply of housing for their employees available at competitive prices and locations close to the place of

employment. However, in recent years, the supply of housing has not kept pace with the demand for housing created by these new employees and their families. If this shortage were to grow or continue, employers would have increasing difficulty in locating in or near the City due to problems associated with attracting a labor force. Employees would be unable to find appropriate housing in the area, and accordingly would be forced to commute long distances. This situation would adversely affect their quality of life, consume limited energy resources, increase congestion on already overcrowded highways, and have a negative impact on air quality.

C. The competition for housing is especially acute with respect to households of low income (those households with incomes of 80% or below median County income). An identifiable portion of the new employees attracted to the City by new non-residential development will live in low and very low income households and will therefore compete with present residents for scarce affordable housing units in the City. Increasing the production and availability of low income housing is especially problematic. Prices and rents for housing affordable to households of low and very low income remain below the level needed to attract new construction. This is even more true for households of very low income (those with incomes 50% or below County median income). Federal and State housing finances and subsidy programs are not sufficient by themselves to satisfy the low

income housing requirements associated with this employment.

D. The City of Sacramento, in cooperation with the County of Sacramento, created a City/ County Housing Finance Task Force to examine housing needs and financial mechanisms to address those needs in the Sacramento area. The report of the Task Force examined the connection between non-residential development projects and housing needs with special emphasis on very low income housing needs. The report concluded that a clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of very low income employee households that are directly associated with such buildings and will accordingly impact the Sacramento housing market. The report further quantified the share of this need represented by very low income households.

The City of Sacramento reviewed the Nexus report and recalculated the housing subsidy amounts based on the employment densities contained in the City's General Plan. Assuming a housing subsidy of $12,000 per unit, the City concluded that each additional square foot of office development, for example, contributes to the need for low income housing subsidy in the amount of $2.74. Similar conclusions for other uses were as follows: research and development, $1.87; manufacturing, $1.32; warehouse, $.82; commercial, $4.33; and hotel, $1.90.

While these numbers may be approximate, it is clear that such development brings in new employees, an estimable percentage of those employees will live in Sacramento County, and that this number yields a certain number of households from which a definable number will be of very low income. Adjustments may be made to this number of households to take into account household size, and multiple earner households, previously housed employees, etc., to yield the approximate per square foot contribution each employment activity contributes to the net new need for housing subsidy.

E. Accordingly, it is appropriate to impose some of the cost of the increased burden of providing housing for low and very low income households necessitated by such development directly upon the sponsors of the development, and indirectly upon the occupiers. The imposition of a housing impact fee and/or housing construction requirement is an appropriate means to accomplish this purpose. In calculating the amount of such fee, the City Council has taken into account other factors in addition to the simple calculation of contribution. These include impact of the fee on construction costs, special factors and hardships associated with certain types of development, and legal issues.

F. The City of Sacramento, on October 15, 1987, adopted several air quality mitigation measures as part of the Sacramento General

Plan Update. One of the mitigation measures was a Housing Trust Fund component which provided for the adoption of a housing fee or housing construction alternative.

G. The need for additional production of housing, especially infill and low income housing, was also addressed in the settlement of litigation surrounding the North Natomas Community Plan. On March 29, 1988, the City of Sacramento entered into a North Natomas Settlement Agreement. The parties to that Settlement Agreement recognized that new employment development, in addition to adversely impacting the supply and availability of affordable housing, increasing housing demand, which if unmet in the City, will in turn increase commuting distances, create additional traffic congestion, energy consumption and air pollution.

An alternative method of offsetting and mitigating this traffic congestion is to provide additional housing in "infill" areas which are already served by infrastructure and not otherwise experiencing new residential construction, since such areas are close to employment centers and public transit service. The North Natomas Settlement Agreement recognized that the development of infill low income housing would be of benefit to the City and region, and accordingly provided that the City would adopt an ordinance providing a means by which new employment development would contribute to the supply of additional housing.

H. Residential infill areas offer a great potential for meeting the City's growth needs. However, the City has not experienced new residential development within these areas. By promoting infill incentives, the City can stimulate the construction of housing that would not otherwise be built, thereby increasing the overall supply of housing available for potential employees located within the City's employment centers.

I. The Nexus report examined the relationship between the number of additional employees associated with various commercial and industrial buildings or land uses and the number of additional households that are directly associated with such buildings and will accordingly impact the Sacramento housing market.

The City of Sacramento reviewed the Nexus report based on the employment densities in the City's General Plan and concluded that each additional square foot of office development contributes to housing demand by .00229 units, research and development contributes .00164 units; manufacturing contributes .00075 units; warehouse contributes .00038 units; commercial contributes .00191 units; and hotel contributes .00076 units. Based on the Nexus report, the dwelling unit to jobs ratio for non-residential uses in the Sacramento area is one dwelling unit per 1.75 new employees.

J. Accordingly, it is appropriate to impose some of the increased burden of providing housing necessitated by such development

directly upon the sponsors of the development and indirectly upon the occupiers. In calculating the housing construction alternative, the City recognized that the private market will address much of the housing demand associated with these non-residential uses. At the same time, private development within infill areas is unlikely to occur without additional significant development incentives. The imposition of a housing construction requirement is an appropriate means to accomplish this objective. As an alternative to full fee payment, the housing construction requirement combines a 20% housing fee with a requirement to construct one dwelling unit within infill areas for every 18 additional employees. This requirement is established well below the relationship between housing demand and non-residential uses for the Sacramento area. Notwithstanding this finding, the housing construction requirement shall become a combination 40% housing fee with a requirement to construct one dwelling unit for every 24 additional employees if and when the North Natomas Settlement Agreement is amended.

K. The Housing Element of the City of Sacramento General Plan calls for the provision of additional housing for all sectors of the population, to accommodate the demands of both existing and new residents attracted to the region by increased employment. The housing element also provides that the City should make special efforts to encourage an increased supply of housing affordable to low and very low income households.

L. It is the purpose of this chapter to establish a feasible means by which developers of non-residential development projects assist in (1) increasing the supply of housing and low income housing; and (2) increasing the supply of housing in close proximity to employment centers. The housing fees and housing construction requirements contained in this section are designed to create a rational relationship between the amount of housing need created by the employment use and the size of the fee or housing construction requirement, taking into account the impact of such fee on housing construction costs and economic feasibility.

The Citywide housing exaction is based upon the Sacramento General Plan, the Sacramento General Plan Environmental Impact Report, the North Natomas Community Plan (NNCP), NNCP Environmental Impact Report and air quality mitigation measures, North Natomas Settlement Agreement, the Sacramento City/County Housing Finance Task Force report and recommendations, together with the reports appended thereto quantifying the Nexus between development and low income housing need. In view of the numerous assumptions and potential in exactitudes which must attend any such studies and recommendations, the City Council has determined that the fees and unit requirements will be set well below the calculated cost of providing market rate and low income housing to persons attracted to the City by these employment opportunities.

M. Although the low-income housing availability issue may be addressed at the City level, the housing market is a regional market. While evidence presented to the Council indicates that imposition of a fee in the City alone will not cause substantial commercial development to leave the City, the Council notes that the relationship between increased commercial development and the need for low income housing is a regional relationship, including both the City and the County. Commercial development in one jurisdiction will generate the demand for low income housing in the other jurisdictions. Conversely, the absence of available low income housing in one jurisdiction puts undo pressure on the other. Adverse environmental effects associated with long commutes impact the citizens of both the City and County. Therefore, a similar fee on commercial development should be imposed within the same time frame in the City and County and dedicated to similar purposes.

II. NORTH NATOMAS FINDINGS

The Council of the City of Sacramento hereby incorporates the previous Citywide findings and also finds and declares as follows:

A. In adopting the North Natomas Community Plan (NNCP), the City Council determined that development in North Natomas could adversely impact development in North Sacramento. To mitigate that impact, the

NNCP requires North Natomas non-residential developers to participate in a Housing Trust Fund to stimulate housing development in North Sacramento.

B. In achieving the jobs-housing balance for North Natomas, vacant residential land in North Sacramento will be utilized. Housing demand generated by Phase I employers shall be met initially through residential development in Phase I of the planning area, as well as development of residential land in North Sacramento.

C. The NNCP establishes a 66% housing units-to-jobs ratio for that portion of the planning area within the City limits and a 58% ratio for the overall planning area. Because of the significant dwelling unit deficiency that could result within the North Natomas planning area, this ratio must be supplemented by developing 4,340 units in North Sacramento. After the development of these units, the Housing Trust Fund requirements for North Natomas will be fulfilled unless future land use amendments require more housing to maintain the specified housing-to-jobs ratio.

D. It is critical that North Natomas non-residential developers participate in efforts, such as the Trust Fund, to get housing developed in adjacent communities, especially North Sacramento. The responsibility for the units will be spread on an employee per acre basis for each non-residential land use in North Natomas. Given a housing fee of $3,500 per dwelling unit to stimulate residential development in North Sacramento,

the City has concluded that each additional square foot of non-residential land uses will need to contribute the following housing subsidy fee amounts: Highway-Commercial, $1.04; Community/Neighborhood Commercial, $.78; Office/Business, $.78; M-50, $.67; M-20, $.55; and Light Industrial, $.42.

As an alternative to fee payment, non-residential developers can construct or cause to construct housing units in North Sacramento. Given a ratio of one dwelling unit per 15 employees, the City has concluded that each additional square foot of non-residential land use will contribute to the construction of housing units according to the following factors: Highway-Commercial, .000296 units; Community/Neighborhood Commercial, .000222 units; Office/Business, .000222 units; M-50, .000191 units; M-20, .000157 units; Light-Industrial, .000121 units.

III. AMENDMENT TO ZONING ORDINANCE

Section 33 is hereby added to the Zoning Code of the City of Sacramento as follows:

SECTION 33

HOUSING REQUIREMENTS FOR NON-RESIDENTIAL DEVELOPMENT PROJECTS

A. GENERAL PROVISIONS

1. Limitation. Unless otherwise expressed in this Zoning Ordinance, the provisions of this Section are the exclusive

procedures and rules relating to housing impact fees, and housing development requirements, in the event of conflict, these provisions shall prevail over any other provisions of this Zoning Ordinance.

B. LOW INCOME HOUSING FUNDS

1. Establishment and Definition. There are hereby established two separate funds. These funds may receive monies from other sources.

   A. Citywide Fund. The Citywide Low Income Housing Fund ("Citywide Fund") shall receive all monies contributed pursuant to Paragraph D.1 and E.1.

   B. Natomas Fund. The North Natomas Fund ("Natomas Fund") shall receive all monies contributed pursuant to Paragraph D.2.

2. Purposes and Limitations.

   A. Citywide Fund. Monies deposited in the Citywide Fund shall be used to increase and improve the supply of housing affordable to households of low income, with priority given to very low income households. For purposes of this section, "low income households" are those households with incomes of eighty (80) percent or below the median income in the County of Sacramento as set forth from time to time by the U.S. Department of Housing and Urban Development and "very

low income households" are those households with incomes of fifty (50) percent or below the same median income. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees. No portion of the Citywide Fund may be diverted to other purposes by way of loan or otherwise.

B. Natomas Fund. Monies deposited in the Natomas Fund shall be used to increase the supply of housing units located within the North Sacramento Community Plan area. Monies may also be used to cover reasonable administrative expenses not reimbursed through processing fees. For purposes of this paragraph, housing units include any price or tenure type of housing.

3. Administration. These funds shall be administered by the Director of the Sacramento Housing and Redevelopment Agency (hereinafter "SHRA Director") who shall have the authority to govern the Fund consistent with this Section, and to prescribe procedures for said purpose, subject to City Council approval.

4. Use and Disbursement of Monies in the Fund

A. Citywide Fund. Monies in the Citywide Fund shall be used in accordance with the adopted Housing Assistance Plan Program and

Financing Strategy to construct, rehabilitate, subsidize, or assist other governmental entities, private organizations or individuals in the construction of low income housing. Monies in the Citywide Fund may be disbursed, hypothecated, collateralized, or otherwise employed for these purposes from time to time as the SHRA Director so determines is appropriate to accomplish the purposes of the Citywide Fund. These uses include, but are not limited to, assistance to housing development corporations, equity participation loans, grants, pre-home ownership con-investment, pre-development loan funds, participation leases, or other public/private partnership arrangements. The Citywide funds may be extended for the benefit of both rental or owner occupied housing.

B. Natomas Fund. Monies in the Natomas Fund shall be used to increase the supply of housing units in North Sacramento in accordance with the policies contained in the North Natomas Community Plan (NNCP). For purposes of this section, increasing the supply of housing includes both the construction of housing and the rehabilitation of dangerous residential buildings as defined in Chapter 50 of the City Code. Monies in the Natomas Fund may be dispersed,

or otherwise employed for these purposes by the SHRA Director, after consultation with the Planning Director, to assure compliance with the NNCP policies and objectives.

5. Location of Citywide Units to Be Assisted with Fund Monies

Subject to City Council approval, the SHRA director shall develop criteria for the location of the units to be assisted with Citywide Fund monies. The purpose of this criterion shall be to: (1) ensure a reasonable geographical linkage between non-residential development projects subject to this ordinance and the assisted low income housing such that future residents of the housing could reasonably commute to the commercial locations; (2) ensure conformity with the Fair Share Plan adopted by the City Council; and (3) promote air quality goals (e.g., access to public transportation). For purposes of criterion (1) above, any location which lies within *seven* (7) miles of the non-residential development project subject to this ordinance shall be presumed to be within reasonable commuting distance. Locations within one quarter (1/4) mile of either existing or planned transit services shall be given preference within the seven mile commuting distance. Locations further than the seven mile distance may receive assistance from the Citywide Fund provided that the

SHRA director finds that access to existing or planned public transit render it reasonable that employees of the development project could commute from the location of the assisted housing. If due to regional growth, increased traffic congestion, or other factors, the SHRA administrator determines at any time in the ensuing year, sites which meet criterion (1) above will not be available, the SHRA director and the director of the Planning Department shall develop and present to the City Council a proposal for ensuring a continued linkage between non-residential development projects subject to this ordinance and the location of assisted housing. Such a proposal may be presented in connection with the Annual Evaluation in paragraph 6 below. Criteria numbers (2) and (3) shall be effective if and when the North Natomas Settlement Agreement is amended.

6. Annual Evaluation. Commencing one year after the effective date of this Section, and annually thereafter, the SHRA Director and Planning Director shall report to the City Council, the City Planning Commission and the Sacramento Housing and Redevelopment Commission on the status of activities undertaken with the Citywide Fund and North Natomas Fund. The report shall include a statement of income, expenses, disbursements, and other uses of the Fund. The report shall also state the number of low income and

total housing units constructed or assisted during that year and the amount of such assistance. The report shall evaluate the efficiency of this Section in mitigating the City's shortage of low income housing available to employees of the projects subject to this Section, stimulating housing development in North Sacramento and alleviating the jobs-to-housing unit imbalance in North Natomas. In this report, the SHRA Director and the Planning Director shall also recommend any changes to this ordinance necessary to carry out its purposes, including any adjustments necessary to the fee or number of housing units required. This report shall contain the findings required by Government Code Section 66001(d).

C. APPLICATION OF THE HOUSING REQUIREMENT.

1. Application: This section shall apply to non-residential development projects that are proposing the construction, addition or interior remodeling of any non-residential development project. This section shall apply to mixed or combined use projects if such projects propose the construction, addition or interior remodeling of such uses. Notwithstanding the foregoing, this section shall not apply to projects which fall within one or more of the following categories:

A. The precise portion of a non-residential development project which

requires (1) discretionary permits (as defined herein) and (2) has received final approval of any such permit on or before March 29, 1988; provided, however, that this exception shall not apply to a non-residential development project which is a permitted use within the applicable zone and therefore does not require discretionary permits. For purposes of this paragraph, the term "Discretionary Permit" means any of the following permits: special permit, development plan ("R") review and design review as required pursuant to the City of Sacramento Zoning Ordinance; or

B. Projects which are the subject of Development Agreements currently in effect with the City of Sacramento, or of Disposition Agreements, Owner Participation Agreements, or Memoranda of Understanding with the Redevelopment Agency of the City of Sacramento, approved prior to the effective date of this ordinance, where such agreements or memoranda do not provide for compliance with this Ordinance; or

C. The non-residential uses set forth in a building permit application accepted as complete by the City or a foundation permit issued by the City prior to the effective date of this Ordinance; or

D. A non-residential development project which has received subdivision map approval prior to March 29, 1988 and has been required by the City to finance unreimburseable off-site sewer, drainage and water improvements that directly benefit residential infill sites (as defined herein); or

E. Residential uses as set forth in Section 2 of the Sacramento Zoning Ordinance; or

F. That portion of any development project located on property owned by the State of California, the United States of America or any of its agencies, with the exception of such property not used exclusively for state governmental or state educational purposes; or

G. Any development project which has received a vested right to proceed without housing fees pursuant to State Law.

2. Definitions: For purposes of this Section, the following definitions shall apply:

A. "Non-residential Development Project" is defined as any commercial or industrial use set forth in Section 2 of the City of Sacramento Zoning Ordinance, and includes any other use that is determined by the Planning Director to impact housing demand.

B. "Gross square feet" is the area included within the surrounding walls of the non-residential development project as determined by the Planning Director. This area does not include garages or carports.

C. "Construction" is a new non-residential development project subject to this section.

D. "Interior remodel" is a tenant improvement which results in a change in the type of use of the non-residential development project that increases the employee density of the project as determined by the Planning Director.

E. "Addition" is adding gross square feet to an existing non-residential development project subject to this section.

F. "Housing Units" is a new dwelling unit of any tenure type or price, including the rehabilitation of dangerous residential buildings as defined in Chapter 50 of the City Code.

G. "Planning Director" is either the Planning Director or the Director of Planning and Development as determined by the Director of Planning and Development.

D. HOUSING FEE REQUIREMENT

1. *Citywide Payment of Fee as a Condition of Issuance of a Building Permit.* Except as provided elsewhere in this Section, no Building Permit shall be issued for any non-residential development project, located outside the North Natomas Community Plan area, subject to this Section as set forth in Paragraph C unless and until a Housing Fee is paid to the building Inspector of the City of Sacramento who shall deposit such fee in the Citywide Fund. The amount of the fee shall be computed as follows: Gross Square Feet Non-Residential Space X (Applicable Fee by type of use as listed in Appendix A to this Section) = Housing Payment. For purposes of this Section, the fees for an interior remodel shall be the fees for the new use as defined in Appendix A, less any fees that either were paid or would have been paid based on the original use of the building.

2. *North Natomas Payment of Fees as a Condition of Issuance of a Special Permit or Building Permit.* Except as provided elsewhere in this Section, no Special Permit or Building Permit shall be issued for any non-residential development project located within the North Natomas Community Plan area unless and until a Housing Fee is paid to the Building Inspector of the City of Sacramento, who shall deposit such fee in the Natomas Fund. The amount of the fee

shall be computed as follows: Gross Square Feet Non-Residential Space X (applicable fee by type of use as listed in Appendix C to this Section) = Housing Payment.

3. *Compliance through Housing Construction.* As an alternative to payment of the Fee set forth in this Section, an applicant for a non-residential development project subject to the Citywide requirements of this Section may elect to comply with those requirements partially through the construction of housing as provided in Paragraph E.1 below. An applicant for a non-residential development project, subject to the North Natomas requirements of this Section, may elect to comply with those requirements through the construction of housing as provided in Paragraph E.2.

E. HOUSING CONSTRUCTION REQUIREMENT

1. *Citywide Requirement.* As an alternative to the fee requirement of Paragraph D.1, an applicant for a permit for uses subject to the requirements of this Section, may elect to perform both of the following prior to the issuance of a building permit for such activity: (1) pay a fee that is at least 20 percent of the fee required pursuant to Paragraph D.1 above and listed in Appendix B to this Section; and (2) demonstrate that it will construct or cause to be constructed any value or tenure type of housing as determined by the following formula:

Gross Square Feet Non-Residential Space X (Applicable Factor by Type of Use as listed in Appendix B to this Section) = Housing Units. No building permit shall be issued by the Building Inspector for any non-residential development project unless and until the Planning Director has certified that the requirements of this Section have been met.

Notwithstanding the requirements of this paragraph, the minimum fee shall become at least 40 percent of the fee required pursuant to paragraph D.1 above and listed in Appendix B if and when the North Natomas Settlement Agreement is amended.

2. *North Natomas Requirement.* As an alternative to the housing fee requirement as provided in Paragraph D.2 above, an applicant for any non-residential development project within the North Natomas Community Plan (NNCP) area may elect to construct or cause to be constructed any value or tenure type of housing as determined by the following formula: Gross Square Feet Non-Residential Space X (Applicable Factor by Type of Use as listed in Appendix C to this Section) = Housing Units. This housing shall be located in those areas of the North Sacramento Community Plan as defined in Paragraph E.7.B.

3. *Approval of Proposal by the Planning Director.* An applicant who chooses to comply with the requirements of this

Section partially through the construction of housing shall submit to the Planning Director sufficient information to enable the Planning Director to determine that the applicant will construct or cause to be constructed the required number of housing units. The application shall demonstrate that the applicant possesses the financial means to commence and complete the construction of the housing within the required time period.

Where the applicant intends to construct housing units through participation in a joint venture, partnership, or similar arrangement, the applicant must certify to the Planning Director that the applicant has made a binding commitment, enforceable by the applicant's joint venturers or partners, to contribute an amount to the joint venture or partnership equivalent to or greater than the amount of the fee they would otherwise be required under Paragraph D, less the portion of the housing requirement of this section actually met through the payment of fees, and that such joint venture or partnership shall use such funds to develop the housing subject to this Section.

The Planning Director may issue guidelines for the administration of this requirement. If the Planning Director approves the proposal, he or she shall issue a certificate so indicating. This

certificate shall be recorded and indicate that compliance with this Section is an obligation of the owner of the non-residential property.

4. *Commencement of Construction.* Within one year of the issuance of the first building permit for a use subject to this Section, the applicant shall provide written certification to the Planning Director that it has commenced construction of the housing units under this paragraph, and where the applicant elects to construct housing through a joint venture or partnership, or other legal entity, that the applicant's monetary contribution to the joint venture, partnership, or other legal entity has been paid in full or has been posted in an irrevocable letter of credit. No certificate of occupancy for the non-residential use shall be issued by the Building Inspector until the applicant complies with this paragraph. This one year period may be extended by a maximum of two one year periods based on evidence submitted by the applicant, if the Planning Director determines that 1) there is good cause for an extension or an additional extension, 2) the failure to comply with the time limits of this paragraph is beyond the owner's control, and 3) the owner has made a reasonable effort to comply with this paragraph.

5. *Completion of the Housing Requirement.* The applicant shall obtain a final inspection from the Building Inspector

for the housing required by this paragraph within two years of the issuance of the first building permit for non-residential use subject to this section. This time period may be extended by the Planning Director by a maximum of two one year periods upon showing good cause as defined in Paragraph E.4.

6. *Fractional Housing Units.* In the event the application of Appendix B or C to an applicable project creates an obligation to construct a fractional housing unit, that fraction shall be converted into an addition to the housing fee, or in the alternative at the election of the applicant, an additional unit.

7. *Location of Housing Units Constructed.*

   A. *Citywide Requirements*: Housing units constructed under Paragraph E.1 shall be located on deep lots or infill sites as defined in Section 9 of the City of Sacramento Zoning Ordinance.

   B. *North Natomas Requirement*: Housing units constructed under Paragraph E.2 shall be located within the following areas of the North Sacramento Community Plan.

      1) Vacant or underutilized lands which have appropriate zoning and land use designations.

      2) Vacant lands next to urban areas or areas with services

which can be easily extended to accommodate development.

3) Vacant infill lots within existing urban areas south of I-80 where services are readily available.

8. *Failure to Cause Housing Construction.* In the event certification of housing construction is not provided as required by this Paragraph E, the Planning Director will determine an amount equal to 150% of the fee which would have been due and owing under Paragraph D to be paid to the City together with interest accrued from the date of the first building permit issuance for the non-residential use and shall so notify the applicant. If the applicant fails to demonstrate good cause for the non payment, said amount shall be assessed against the applicant.

If this amount is not paid by the applicant within sixty days of the expiration of the applicable time period, the City shall record a special assessment lien against the non-residential subject to this section in the amount of any fee and interest owed, or in the alternative the certificate of occupancy shall be revoked for the non-residential use.

After appropriate notice, the City Council shall hold a special assessment hearing. If the assessment is confirmed, the delinquent fee shall constitute a special assessment against the parcel or parcels used in the development project subject to this section. Each such assessment

shall be subordinate to all existing special assessment liens previously imposed upon such parcel and paramount to all other liens except for those state, county, and municipal taxes with which it shall be upon parity. The lien shall continue until the assessment and all interest due and payable thereon are paid to the City.

F. VARIANCES

1. *Variances.* A variance from the provisions of this Section may be granted to an applicant by the Planning Commission. The applicant must file an application for a variance within 10 days of the Planning Director's determination pursuant to Paragraph D or E. Any hearing required by the provisions of this Section shall be governed by the provisions of Section 14 of this Zoning Ordinance.

2. *Application.* The application for a variance shall include financial and other information that the Planning Director determines is necessary for staff to perform an independent evaluation of the applicants' rationale for the variance and shall be a matter of public record.

3. *Standards.* No variance shall be issued to an applicant unless:

   a. Special circumstances, unique to that project and not generally applicable to other projects so that the same variance would be appropriate for any applicant facing similar

circumstances, justify the grant of the variance; and

b. The project would not be objectively feasible without the modification; and

c. A specific and substantial financial hardship would occur if the variance were not granted; and

d. No alternative means of compliance are available which would be more effective in attaining the purposes of this section than the relief requested.

4. *Low Density Employment Uses Requiring Specialized Structures.* A variance may be granted in the case of development projects which consist of construction built for and suitable solely for a specific use involving few or no employees. In the case of a variance granted pursuant to this section for a use which involves some employees, the variance may specify a reduced fee applicable to the project. Any variance granted under this section shall expire upon the conversion of the building to another use or upon the remodeling of the building to permit additional employees.

5. *Findings.* In approving a variance, the Planning Commission shall make findings pursuant to each of the standards defined in Paragraph E.3.

G. ADMINISTRATION

1. *Application Procedures for Discretionary Projects Subject to this Section*

   Compliance with this Section will be made a condition of approval of each Special Permit approved for a non-residential development project subject to this Section. The application procedures defined in Paragraph G.2 shall apply to all special permit applications.

2. *Application Procedures for Ministerial Projects Subject to this Section*

   Applications for building permits for any project subject to the provisions of this Section shall not be deemed complete unless the application contains (1) a statement of the number of gross square feet in a non-residential development project to be constructed, added or remodeled that are subject to the requirements of this Section, together with documentation sufficient to support the application; (2) the intended use or uses for the non-residential development project by gross square feet; (3) a statement of an election by the applicant as to its choice of compliance with requirements of this Section through payment of the fee (Paragraph D), or construction of housing (Paragraph E).

   If compliance is purely through the payment of the fee, a copy of the building permit application shall be transmitted to the Planning Director by the Building

Inspector. If the compliance is through a combination of payment of fee and construction of housing, the Building Inspector shall transmit a copy of the building permit application to the Director and the applicant shall furnish the information required in Paragraph G to the Planning Director.

3. *Determination of Fee.* The Planning Director shall determine the amount of fee and/or number of housing units required to be constructed, and shall so inform the Building Inspector who shall collect the required fee and transmit it to the appropriate Fund.

4. *Revisions to Appendix A and B.* The fees set forth in Appendix A, B and C shall be revised effective January 1 of each year by the percentage increase or decrease in the building cost Index of the Cost Indices for Twenty Cities published by M.C. McGraw-Hill, Inc. or its successor since January 1 of the previous year. The SHRA Director, in consultation with the Planning Director, shall prepare a recommendation to the City Council for such revision on an annual basis.

5. *Infill Area Designations.* The Planning Director shall make a determination of infill areas for purposes of this Section on an annual basis.

6. *Processing Fees.* The Planning and Development Department shall collect a processing fee to administer the Housing Trust Fund Ordinance. This fee or fees

will be established by City Council Resolution.

DATE PASSED FOR PUBLICATION: FEB 28 1989

DATE ENACTED: MAR 7 1989

DATE EFFECTIVE: APR 6 1989

/s/ Anne Rudin
MAYOR

ATTEST:

ACTING /s/ Janice Beaman
Assistant CITY CLERK

APPENDIX A

HOUSING FEE REQUIREMENT
CITYWIDE

* TYPE OF USE	FEE/BUILDING SQUARE FEET
Office	$.95
Hotel	$.90
Research and Development	$.80
Commercial	$.75
Manufacturing	$.60
Warehouse	$.25

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* Non-residential development projects that do not fall within a specific type of use category will be evaluated by project basis to determine an appropriate fee.

APPENDIX B

HOUSING FEE AND CONSTRUCTION ALTERNATIVE CITYWIDE

* TYPE OF USE	20% FEE/ BUILDING SQ. FT.	HOUSING UNIT FACTOR/SQ. FT.
Office	$.19	.000127
Hotel	$.18	.000042
Research and Development	$.16	.000091
Commercial	$.15	.000106
Manufacturing	$.12	.000042
Warehouse	$.05	.000021

* Non-residential development projects that do not fall within a specific type of use category will be evaluated on a project by project basis to determine an appropriate fee and housing unit factor.

APPENDIX C

HOUSING FEE AND CONSTRUCTION REQUIREMENT NORTH NATOMAS ONLY

* TYPE OF USE	FEE/BUILDING SQ. FT.	HOUSING UNIT FACTOR/SQ. FT.
Highway Commercial	$ 1.04	.000296
Community/ Neighborhood Commercial	$ .78	.000222
Office/Business	$ .78	.000222
M-50	$ .67	.000191
M-20	$ .55	.000157
Light Industrial	$ .42	.000121

* Each non-residential development project will be subject to a fee which is based on the applicable North Natomas Community Plan land use category.

APPENDIX E

[SEAL]

CITY OF SACRAMENTO

CALIFORNIA

OFFICE OF THE
CITY CLERK

LORRAINE MAGANA
CITY CLERK

ANNE J. MASON
ASSISTANT CITY CLERK

JANICE M. BEAMAN
DEPUTY CITY CLERK

CITY HALL
ROOM 304
915 I STREET
SACRAMENTO, CA
95814-2671

ADMINISTRATION
916-449-5799

OPERATION SERVICES
916-449-5426

SPECIALIZED SERVICES
916-449-8200

VOLUME III

ADMINISTRATIVE RECORD
FOR MATTERS RELATING TO THE
HOUSING TRUST FUND ORDINANCE

(M-87076)

6-9-89

APPENDIX 1

KeyserMarstonAssociatesInc.

Timothy C. Kelly
A. Jerry Keyser
Kate Earle Funk
Robert J. Wetmore
Michael Conlon
Denise E. Conley

Golden Gateway Commons
55 Pacific Avenue Mall
San Francisco, California 94111
415/398-3050

LOS ANGELES 213/622-8095
Richard L. Botti
Calvin E. Hollis, II

SAN DIEGO 619/942-0380
Heinz A. Schilling

November 25, 1987

MEMORANDUM

TO: Sacramento Housing and Redevelopment Agency
Attn: Lester Smith

FROM: Keyser Marston Associates, Inc.

SUBJECT: COMMERCIAL AND INDUSTRIAL DEVELOPMENT AND VERY LOW INCOME HOUSING NEXUS ANALYSIS

The following memorandum report summarizes Keyser Marston Associates, Inc's. (KMA's) preliminary analysis of the linkage between the development of various types of commercial and industrial buildings and very low income housing needs. The purpose is to illustrate the linkages between new employment in these buildings and the number of households meeting the very low income criteria that are directly associated with the buildings.

This analysis, which was contracted by the Agency, was intended to provide input to the Housing Task Force for use in its investigation of possible fee structures as one of the alternative means of raising funds for increasing the

supply of low income housing. The recent Nollan decision by the Supreme Court emphasized the need to establish the "nexus" or relationship between the government restriction or fee and the impact expected from the development or action.

This memorandum report is divided into two parts. The first summarizes the analysis and provides a discussion of the strengths and weakness of the analysis, data availability, and other points of special consideration. It also provides preliminary conclusions on the number of very low income households for each land use type and possible fee structure alternatives. The second part is an in-depth explanation of the steps of the analysis and a documentation of the data sources utilized.

Conclusions

The first conclusion of the analysis is that a very clear nexus can be established between the employees of various commercial and industrial buildings or land use types and the number of very low income employee households that are directly associated with the buildings. Even though some of the steps lack complete data substantiation of the precise numbers, the linkage clearly exists.

The second conclusion is that while a nexus clearly exists, the analysis and numerical results raise some major questions and issues about accounting for the growth of very low income households in a growing economy.

The numerical results of the analysis are that for every 100,000 square feet of building area, there are the following number of very low income employee households

that live in Sacramento County. The percentage of very low income employee households to all employees is indicated by the column on the right.

Building Type	Number of Very Low Income Employee Households	Percent all Employees
Office	18.4	4.3%
Research & Devel.	13.4	5.1%
Manufacturing	10.7	8.2%
Warehousing	3.3	10.0%
Retail	33.7	10.1%
Hotel	15.2	11.4%

The Analysis Approach and Framework

The analysis approach is to examine the employment associated with the development of 100,000 square feet of each of six building types. The six building types are:

Office
Research and Development (R&D)
Manufacturing
Warehousing
Retail
Hotel

The analysis is conducted for Sacramento County as a unit.

Table 1 presents the numbers for each step and building type. Following is a brief description of each step. A more detailed description is contained in the Appendix, Methodology and Documentation.

The Analysis Steps

Step 1. Estimate of Total New Employees

The first step identifies the total number of direct employees who will work at or in the building type being analyzed. Employment densities are based on local industry averages in some cases such as office, retail and hotel. For the three industrial categories the densities are based on local Sacramento analyses of employment densities per acre converted to buildings with FAR adjustments.

In starting with a number of employees in the building there is an implicit assumption that all employees are new employees to the County. If the employees in this building have relocated from other buildings, they will have vacated spaces somewhere else and somewhere in the chain new employees will have come to Sacramento County to work.

Step 2. Estimate of Employees Living in Sacramento County

This step factors out the employees who work in Sacramento County but live outside the county. The factor is generated by 1980 U.S. Census information which tells us that of the total number of people who work in Sacramento County, 89% also live there. This percentage varies slightly by occupation, but for ease of analysis the 89% factor was used for all six categories. On a preliminary judgmental basis, no updating was deemed necessary given the substantial percentage of both residential and

non-residential development that is occurring in Sacramento County vs. the other counties in the metropolitan area.

Step 3. Adjustment of Increases in Labor Force Participation

This step eliminates new employees who were previously living in Sacramento County but not working. One local analysis found that 18% of a the employment growth in Sacramento County during the 1970 decade resulted from increases in labor force participation but this rate was expected to decrease in the late 1980's. For analysis purposes a 15% factor was used and applied to all six categories.

Step 4. Estimate of the Number of Households

This step recognizes that there are frequently more than one employee per household and reduces the number of employees to the number of households. The SHRA is using the figure of 1.35 employees per non-elderly household, a figure derived from Census information. The 1.35 reduction factor is applied to all six categories.

Step 5. Breakdown of Employees by Occupation

This step divides the employees representing new households into occupational groupings using industry by occupation matrices prepared by the State Employment Development and the U.S. Department of Labor. Occupational categories include Professional/Technical/Managerial, Clerical, Craft/Kindred, Operator, Laborer.

("Industry" categories closely approximate our building type or land use starting point)

Step 6. Estimate of Employees Meeting Very Low Income Definition

In Step 6 occupation is translated to income distribution (without consideration for household size) with focus on the very low income end of the scale. For this step we could not locate a percentage distribution for any of the categories except office. For the other building type/land use categories and their related occupational spread, we had to rely on Sacramento wage survey material prepared by state and local sources. This survey material gave typical wage rates for sample jobs that could be related to occupations. KMA had to make judgments about the likely percentage that fell into the income levels that could qualify as very low income, or below $17,050 per year using SHRA numbers. This step is a weak link in the chain as far as documentation of the allocation by income is concerned. More research would likely enable a refinement of the numbers because surely better information exists at least at the national level.

Step 7. Estimate of Household Size Distribution

In this step, a household size distribution was sought in order to get from income distribution to the income and household size combinations that meet the definitions of very low income established by HUD and used by SHRA. Household size data is not readily available for the number of wage earners per household but the 1980

Census does provide a percentage breakdown of household size for households with incomes less than $15,000 and under 65 years of age. Since the $15,000 figure is 1979 dollars it was deemed a close enough approximation for $17,050 in the late 1980's.

Following is a percentage breakdown of households under $17,050 by size:

Household Size	Percent
1	36%
2	28%
3	18%
4	11%
5 or more	7%

This distribution was used for all building type/land use categories.

Step 8. Estimate of Very Low Income Households That Meet Size and Income Criteria

In this step we had to build a matrix of household size and income to establish probability factors for the two criteria in combination. For each occupational grouping a probability factor was calculated for each of HUD's income and household size levels. This step is performed for each occupational category.

To estimate the number of very low income households these probability factors calculated for each occupation are multiplied by the number of households by occupation in Step 5 and then totaled to arrive at the number of very low income households. This step is performed for each land use.

See in depth description and attached appendix table.

Step 9. Adjustment to Eliminate Most Multiple Earner Households

This last step makes an adjustment to eliminate most of the households that have two or more earners such that the incomes in combination make the household no longer qualify as very low income. The U.S. Census tells us that overall 40% of the households have one wage earner but in the under $15,000 households, 70% have only one wage earner. A 70% adjustment would make the assumption that all two or more income households do not qualify as very low income. Recognizing that there is likely a significant share of multiple wage earner households that still do qualify (particularly among minority households where families may be large and skill levels low), we made the judgment to use a 75% factor.

This final adjustment produces the number of very low income households directly associated with 100,000 sq. ft. of building area by type.

Issues Raised by the Analysis

1. Responsibility for Growth

The nexus analysis illustrates how the typical cross section of employees in a commercial or industrial building will likely include a certain number of employees from very low income households. The nexus analysis does not make the case that building construction is responsible for growth. Clearly many factors come into play in determining what makes a region grow. At best, it can be said that the production of buildings to accommodate growth

is but one of many factors that enable or contribute to its occurrence.

2. Direct vs. Indirect Employment

The analysis addresses direct employment only, or that which is employed within the building. In the case of office space, direct employment covers the various managerial, professional and clerical workers that work in the building; it does not include the janitorial workers, the window washers, the security guards, the delivery services, the landscape maintenance workers, and many others that are associated with the normal functioning of office buildings. These indirect employees tend to be the many service workers at the lower end of the pay scale. No data source could be located which deals with these indirect types of office employees. Confining the analysis to direct employment does not address all the low income workers associated with each land use and seriously understates the impacts.

Once the door is opened to indirect employees, there is the question of how far to take the analysis. For decades now, huge econometric models have grappled with the question of multipliers and produced a broad range of conclusions. We are not aware of any that have specifically addressed lower income jobs or households. Another approach to thinking about low income job generation is to think through where in the economy the low income jobs are to be found. Without undertaking such an analysis, we believe they would be largely represented in agricultural workers, a whole host of service workers

(many of which are not associated with particular buildings, like gardeners, transportation workers, hospital workers, construction laborers, etc.) In other words, any analysis that ties low income housing to particular types of buildings will continue to be incomplete.

3. Growth Inducing vs. Population Serving

The high proportion of low income employees in retail buildings raises the question as to whether retail should be treated the same as the other categories. The other categories are generally considered the primary growth inducers, whereas retail might be regarded as more population serving. Classical economic base theory divides all employment in a given geographical area between those engaged in activities which bring in dollars from the outside work (or "basic" employees) and those which serve the local economy. Every industrial category has some of both, but some industries such as manufacturing tend to have a far higher percentage of basic employees than local.

An economic base analysis would be a very different analysis than the nexus analysis presented here. It would produce one way of treating the land uses differently and would likely result in retail carrying less of a burden than, say, R&D. It should be recognized, however, than any economic base analysis is apt to be controversial since there are several schools of thought about growth generation and regional economies.

Qualifiers to the Analysis

The goal of this "first cut" through the analysis was to determine if the nexus could be found and to illustrate how it works. As such there were steps in the analysis where the data was insufficient to generate fully documented linkage numbers and thus judgments had to be made in order to complete the analysis. The agreement with SHRA was to use readily available data and leave further research until a later time if it was deemed necessary. As an example, we had good information on the occupational distribution of employees in manufacturing but could not locate data on the spread of, say, machine operators by income level. (Nor, of course, did we have the income distribution of manufacturing employees in general.) Instead we had to rely on sample wage scales for machine operators in Sacramento and estimate the percentages that likely fell into the various income categories. Surely data providing a spread by income exists at least on the national level which could perhaps be augmented by local union information.

In other cases metropolitan area wide averages were used when a more indepth analysis might distinguish differences by land use or occupation. For example labor force participation increases may be higher among office workers than industrial workers.

Finally, it should be emphasized that any analysis of this nature, no matter how in-depth, contains a great many numbers and numerous judgments relating to them. It will always be possible to take issue with a specific number. We do not believe, however, that changing most

of the individual numbers would fundamentally alter the conclusions of the analysis.

Nexus Conclusions and Implications on Fee Structures

Tables 2 through 5 present analyses that relate the conclusions of the nexus analysis to fee amounts and the revenue goals of the Housing Task Force.

It is important to emphasize that the conclusions on fees related to nexus amount establish the upper limit of fees that may be imposed while meeting the legal nexus test. The Task Force is at liberty to set fees in any amount below the nexus conclusions without further documentation.

Table 2 starts with the conclusions of the nexus analysis in terms of number of households and translates the figures into housing cost. The first set of numbers addresses the total cost of each unit at $36,000 per very low income housing unit and the second set address the subsidy or gap portion at $12,000 per unit. (per SHRA costs). The total cost burden would result in fees per square foot of building area ranging from $1.18 for warehouses to $12.13 for retail buildings. The subsidy or gap portion results in fees a third of these amounts, still making retail over $4 per square foot.

Table 3 provides a calculation of the revenue raised at the two fee levels based total housing costs and based on the subsidy or gap portion. The volume of construction is the 1984-86 average as calculated by SHRA staff. (See appendix table). The conclusion is that at the full fee amount

over $33 million would be raised, and at the subsidy portion fee over $11 million.

Table 4 examines the impact on construction costs of the fee amount. Since it is evident that the total housing amount produces clearly excessive fees and revenues, only the subsidy or gap portion is evaluated. Impacts on construction costs range from a low of 1.5% on average for warehouse structures to over 10% for retail buildings. Fee impact is also presented on a range basis to reflect the construction cost range for each land use. For example, office buildings may be one story structures costing under $40 per square foot or highrise structures costing twice that amount.

Table 5 presents some alternative suggestions for approaches to setting fee amounts. The first alternative is an across the board 50% cut of the "pure nexus" amount for the subsidy or gap portion. In this case, retail still comes out with a fee in excess of $2 per square foot or a 3% to 6% levy on construction costs. This approach adheres to the nexus relationships without regard to impacts on construction costs. Total revenue raised based on the 1984-86 construction activity would average over $5.5 million per year.

The second alternative approach is to produce a blend or hybrid of the nexus amount and acceptable impact on construction costs. For purposes of illustration, a three percent ceiling on construction cost impact was applied. Nexus amount numbers were reduced in varying degrees to meet the impact criteria. Since this alternative is sensitive to impact considerations, it would be appropriate to have fee variations for different construction costs. The

variation on the second alternative bypasses the varying construction cost issue by stating the fee in terms of a dollar amount on building permit valuation instead of building size.

The second alternative in either form would have raised revenues in the amount of over $3.5 million on the 1984-86 average annual construction activity.

Other Fee Considerations

The Task Force may wish to consider fee exemption to buildings below a certain size or dollar valuation. The rationale behind an exemption for small buildings is to minimize the impacts on developers of small projects and to minimize the impact on rents. Of the building types analyzed, retail projects would likely be the biggest benefactors, followed by neighborhood serving office structures. A possible cut off size for consideration might be 10,000 square feet. The revenue impact of a small building exemption has not been analyzed but is something could be done if desirable.

The Task Force should also consider fees on additions and improvements to existing structures. Again, an exemption for minimum size buildings is probably warranted.

Table 1

COMMERCIAL & INDUSTRIAL BUILDING TYPES VERY LOW INCOME HOUSING NEXUS ANALYSIS

STEPS		OFFICE		INDUSTRIAL R&D		INDUSTRIAL MANUFACTURING		INDUSTRIAL WAREHOUSING		RETAIL		HOTEL	
1.	Estimate of Employees per 100,000 SF Building Employment Density Factor (Per Employee)	236 SF		380 SF		760 SF		3,000 SF		300 SF		1.25 Rm	
	Number of Employees	423		263		131		33		333		133	
2.	Employees living in Sacramento County (89%)	376		234		116		29		296		118	
3.	Adjustment for Labor Force Participation Increase (15%)	320		199		99		25		252		100	
4.	Adjustment for Number of Households (1.35 employees/household)	237		147		73		18		186		74	
5.	Employment Occupational Distribution	%	#	%	#	%	#	%	#	%	#	%	#
	Professional/Technical	46	107	50%	74	21%	15	17%	3	20%	37	13%	10
	Managers	–		–		–		–		–		–	
	Clerical	46%	109	17%	25	12%	9	23%	4	10%	19	13%	10
	Craft	–		11%	16	21%	15	9%	2	8%	15	6%	4
	Operator	–		20%	29	40%	29	22%	4	3%	6	–	–
	Laborer	–		2%	3	6%	5	29%	5	7%	13	–	–
	Sales/Service	8%	19	–						52%	96	68%	50
		100%	237	100%	147	100%	73	100%	18	100%	186	100%	74

Table 1 (CONT.)

COMMERCIAL & INDUSTRIAL BUILDING TYPES VERY LOW INCOME HOUSING NEXUS ANALYSIS

	STEPS	OFFICE		INDUSTRIAL R&D		INDUSTRIAL MANUFACTURING		INDUSTRIAL WAREHOUSING		RETAIL		HOTEL	
6.	Households Earning Less Than $17,080	%	#	%	#	%	#	%	#	%	#	%	#
	Professional/Tech./ Manager	6%	7	6%	4	6%	1	6%		6%	2	6%	1
	Clerical	56%	61	56%	14	56%	5	56%	2	56%	11	56%	6
	Craft	–		35%	6	35%	5	35%	1	35%	5	35%	1
	Operator	–		75%	22	75%	20	75%	3	75%	5	75%	
	Laborer	–		90%	3	90%	5	90%	5	90%	12	90%	
	Sales/Service	–		–		–		–		90%	86	90%	45
			68		46		36		11		121		53
7/8.	Households Meeting Criteria												
	Professional/Technical/ Managers	1.6		1.1		.2		.1		.6		.2	
	Clerical	23.0		5.2		1.9		.9		4.0		2.1	
	Craft	–		2.1		1.9		.3		1.9		.5	
	Operator	–		8.4		8.4		1.2		1.7		–	
	Laborer	–		1.1		1.9		1.9		4.9		–	
	Sales/Service	–		–		–		–		–		17.5	
		24.6		17.9		14.3		4.4		45.0		20.3	
9.	Adjusted to Eliminate Multiple Earner Households Earning in Excess of $17,000	18.4		13.4		10.7		3.3		33.7		15.2	

Source: Keyser Marston Associates, Inc.
November 1987

Table 2

VERY LOW INCOME HOUSING COST & COST OF SUBSIDY PORTION PE

(SACRAMENTO CITY AND COUNTY)

		OFFICE	R&D
1.	Very Low-Income Households Employed Per 100,000 Sq.Ft. Development	18.4	13.4
2.	Cost of Housing @ $36,000/unit	$662,400	$482,400
3.	Cost of Housing Per Sq.Ft. Bldg. Area (Line 2, – 100,000 sq.ft.) i.e. Nexus Amount	$6.62	$4.82
4.	Cost of Housing Subsidy Portion @ $12,000/Unit	$220,800	$160,800
5.	Cost of Housing Subsidy Per Sq.Ft. Bldg. Area (Line 4 – 100,000 sq.ft.) i.e. Nexus Amount	$2.20	$1.61

In 1987 Dollars

Source: Keyser Marston Associates, Inc.
September, 1987

PER SQ.FT. BUILDING AREA

MFG.	WAREH.	RETAIL	HOTEL
10.7	3.3	33.7	15.2
$385,200	$118,800	$1,213,200	$547,200
$3.85	$1.28	$12.13	$5.47
$128,400	$39,600	$404,400	$182,400
$1.28	$0.39	$4.04	$1.82

Table 3

REVENUE GENERATING POTENTIAL FEES AT NEXUS AMOUNT

(SACRAMENTO CITY & COUNTY)

		OFFICE	R&D	MFG.	WAREH.	RETAIL	HOTEL	OTHER	TOTAL
1.	Total Housing Cost Per Sq.Ft. At Nexus Amount (Table 1, Line 3)	$6.62	$4.82	$3.85	$1.18	$12.13	$5.47	NA	NA
2.	Annual Average Sq.Ft. Construction 1984-86 Average (City Analysis, Table A-1)	2,203,217	235,023	470,046	1,645,162	1,487,687	397,975	283,810	5.7M
3.	Total Revenue	$7,965,300	$1,312,800	$1,809,700	$1,941,300	$18,045,600	$2,176,900	NA	$33.2M
4.	Housing Subsidy Portion Per Sq. Ft. at Nexus Amount (Table 1, Line 5)	$2.20	$1.61	$1.28	$0.39	$4.04	$1.82	NA	NA
5.	Total Revenue (Based on Line 4 above)	$2,647,100	$378,400	$601,700	$641,600	$6,010,300	$724,300	NA	$11.03M

In 1987 dollars.

Source: Keyser Marston Associates, Inc.
September, 1987

Table 4

IMPACT ON CONSTRUCTION COST EVALUATION OF FEES AT SUBSIDY NEXUS AMOUNT

(SACRAMENTO CITY & COUNTY)

		OFFICE	R&D	MFG.	WAREH.	RETAIL	HOTEL
1.	Subsidy Portion Nexus Amount (Table 1, Line 5)	$2.20	$1.65	$1.28	$0.39	$4.04	$1.82
2.	Construction Cost Per Sq.Ft. (City Analysis Table 1-A)	$60	$45	$40	$25	$38	$60
3.	% Increase on Average	3.6%	3.7%	3.2%	1.5%	10.6%	3.0%
4.	Range to Reflect Variations within Category for Different Construction Types	1%-5%	3%-5%	2%-4%	1%-2%	5%-12%	2%-4%

In 1987 Dollars.

Source: Keyser Marston Associates, Inc.
September, 1987

Table 5

VERY LOW INCOME HOUSING TRUST FUND NEXUS FEE ALTERNATIVES

(SACRAMENTO CITY AND COUNTY)

	OFFICE	R&D	MFG.	WAREH.	RETAIL	HOTEL	OTHER	TOTAL
#1 PURE NEXUS SUBSIDY FEE @ 50% ACTUAL								
Nexus Fee Per Sq.Ft. (50% x Table 1, Line 5)	$1.10	$0.80	$0.64	$0.195	$2.02	$0.915	NA	NA
Revenue Raised	$1,323,600	$188,000	$300,800	$320,800	$3,005,100	$362,200	NA	$5.50M
Impact Range on Construction Cost	1%-3%	1%-3%	1%-2%	0.5%-1%	3%-6%	1%-2%	NA	NA
Variations: Exemptions for Minimum Size Buildings								
#2 BLENDED APPROACH – PER SQ.FT. FEE								
Nexus Fee Per Sq.Ft.	$1.00	$.80	$0.50	$0.25	$0.75	$.90	$0.50	$0.73
Revenue Raised	$1,203,200	$188,000	$235,000	$411,300	$1,115,800	$358,200	$141,900	$3.65M
Impact Range on Construction Cost	1%-3%	2%-3%	1%-3%	1%-1.5%	1.5%-3%	1%-3%	1%-3%	NA
Variations: Differentiated Fee by Construction Type Exemptions for Minimum Size Buildings								
#2 BLENDED APPROACH VARIATION – FEE ON VALUATION								
Nexus Fee on Valuation	$.015	$.015	$.013	$.012	$.018	$.014	$0.15	$0.14
Revenue Raised	$1,082,900	$158,600	$244,400	$493,500	$1,017,600	$334,300	$191,800	$3.52M
Impact Range on Construction Cost	1.5%	1.5%	1.3%	1.2%	1.8%	1.4%	1.5%	1.4%
Variations: Exemptions for Minimum Size Buildings								

Source: Keyser Marston Associates, Inc.
September, 1987

TABLE A-1

COMMERCIAL AND INDUSTRIAL CONSTRUCTION PERMIT ACTIVITY

SACRAMENTO CITY AND COUNTY

CONSTRUCTION VALUE	I_T 84/85	I_T 85/86	84-85 average	Average cost per sq. ft.	85/86 Estimated sq. ft.
New Construction					
Motels, hotels	40,011,405	7,745,623	23,878,514	60	397,975
illegible, assembly	2,798,566	10,339,946	6,569,256	50	131,385
Industrial, warehousing	69,999,592	71,014,340	70,506,966	30	2,350,232
Service stations	1,593,916	3,441,031	2,517,474	42	59,940
Offices, banks	84,109,814	60,276,175	72,192,995	60	1,203,217
Retail	52,416,155	60,648,083	56,532,119	38	1,487,687
Other non-residential	3,678,379	3,720,439	3,699,409	40	92,485
Subtotal	254,607,827	217,185,637	235,896,732		5,722,922
Additions, alterations, repairs	90,771,472	103,596,148	97,183,810		
Total Commercial Value	345,379,299	320,781,785	333,080,542		

ILLUSTRATIVE FEE SCHEDULES

Approximate fee to raise:	1,000,000	$0.17 per square foot of '84-'86 avg. 0.42% of new construction value
	3,000,000	$0.52 per square foot of '84-'86 avg. 1.27% of new construction value
	6,000,000	$1.05 per square foot of '84-'86 avg. 2.54% of new construction value

SHRA staff, August 1987

*Industrial	Sq. Ft. Distribution		Valuation Distribution	
	%		Per Sq.Ft.	
R&D	10%	235,023	45	10,576.1
Manufacturing	20%	470,046	40	18,801.8
Warehousing	70%	1,645,162	25	41,129.1
Total		2,350,232	$30	$70,507.0

Footnote: Keyser Marston Associates, Inc.

SACRAMENTO HOUSING
NEXUS ANALYSIS
METHODOLOGY AND DOCUMENTATION

STEP 1: ESTIMATE OF TOTAL NEW EMPLOYEES

The estimate of the number of employees is derived based on an employment density factor for each land use. As shown below, the gross building area is divided by the employment density factor to calculate employment.

Gross Building Area	-	Employment Density Factor	=	Employment

The employment density factor is different for each land use and can widely vary within each land use depending on land use types. Densities in manufacturing, for example, vary within a huge range. Other land uses are more constant. Employment density factors in this analysis are based on KMA's experience in working in the Sacramento market and on local published data.

The office employment density factor is estimated at 236 square feet per employee. This estimate assumes a 5% office vacancy factor. The employment density factor for retail is 300 square feet per employee and for hotel 1.25 rooms per employee. These density factors are based on typical tenant types in the Sacramento market.

For industrial employment density factors, KMA has in part relied on information published by the Sacramento County Planning Department. The County provides data on the number of jobs per acre. Research and development, manufacturing, and warehousing and distribution jobs per acre are estimated in the Sacramento region at

40, 20 and 7.5, respectively. KMA has estimated employment density factors for the these three industrial land uses using these data along with average building area per acre ratios or F.A.R.'s. The building area per acre ratios, which based on typical industry standards, are .35 for both research and development and manufacturing and .50 for warehousing and distribution.

The employment density factors used in this analysis are the following:

Office	236/SF
Research and Development	380/SF
Manufacturing	765/SF
Warehousing and Distribution	3000/SF
Retail	300/SF
Hotel	1.25/Rm

Data Source: "The Sacramento Region in 1990 Economic Growth and the Demand for Industrial Land", Sacramento County Planning and Community Development Department, 1982.

STEP 2: ESTIMATE OF EMPLOYEES LIVING IN SACRAMENTO COUNTY

This step estimates the number of employees residing in Sacramento County.

Employment	x Percentage of Workers Residing in Sacramento County	=	Employees Residing in Sacramento Co.

The percentage of Sacramento workers residing in Sacramento County is estimated based on 1980 Census data. The census reports there are 318,100 workers over sixteen

years of age working in Sacramento County of which 283,100 also live in the County. This indicates 89% of the people who work in the County also resides in the County. This estimate is an average across all occupational groups and land uses. Examining selected occupations indicates that this average can range plus or minus 5%. For purposes of our analysis, this range is viewed as statistically insignificant.

Data Source: "1980 Census of Population, Journey to Work: Characteristics of Workers in Metropolitan Areas", U.S. Department of Commerce, Section 3, pgs. 301-302.

STEP 3: ESTIMATE OF INCREASED LABOR FORCE PARTICIPATION

This step eliminates employees that enter the labor force as a result of increased participation by existing Sacramento residents. Women, who were not formerly in the labor force, going to work accounts for the vast majority of increased participation. Based on Economic Development Department (EDD) and Sacramento County Planning Department data, KMA estimates 18% of all new jobs between 1970 and 1980 in the Sacramento Metropolitan area were filled due to increased labor force participation by Sacramento residents. This percentage is calculated based on County data that indicated approximately 27,000 jobs between 1970 and 1980 in the Sacramento region were filled due to increased labor force participation while during the same period employment grew by 150,000 jobs.

In our judgement, this percentage should decline over the next decade as fewer second wage earners in households enter the labor force. For purposes of this analysis, we estimate 15% of all new jobs will be filled by residents in existing Sacramento households. Conversely, 85% of the new jobs will be filled by residents that represent new household formations.

Employees Residing in Sacramento Co.	x	% of jobs filled by new households	=	Employees In New Households

Data Source: "The Sacramento Region in 1990, Economic Growth and the Demand for Industrial Land," Sacramento County Planning and Community Development Department, Appendix 3.

State of California, Economic Development Department, Employment figures for the Sacramento SMSA for 1970 and 1980.

STEP 4: ESTIMATE OF THE NUMBER OF HOUSEHOLDS

This step estimates the number of households represented by a given number of employees. The number of households needs to be estimated since housing assistance is based on household income and household size. The Sacramento Housing and Redevelopment Agency estimates there are 1.35 wage earners per non-elderly household. Using this factor the number of households can be calculated.

Employees In New Households	Average Number of Workers per Household	=	New Households

Data Source: Sacramento Housing and Redevelopment Agency

STEP 5: BREAKDOWN OF HOUSEHOLDS BY OCCUPATION

This step divides households by occupational groupings for each land use. For purposes of this analysis, we have relied on the occupational groupings defined by the State of California Employment Development Department. Occupational groupings include Professional/Technical/Managerial, Clerical, Craft/Kindred, Sales, Service, Operative and Laborer. For each land use category, such as office, the total number of households identified in Step 4 are disaggregated into occupation categories. In this step, we have relied on data for the Sacramento region whenever possible, but for some land uses we have turned to national census data to complement local data.

Our primary source for office and industrial land uses was the industry and occupation matrix prepared by EDD. For retail and hotel we relied on the occupation industrial survey in the 1980 U.S. Census.

New Households	x	Percentage of Households in each Occupation Category	=	New Households in each Occupation Category

Data Source: "1980-1985 Projections of Employment by Industry and Occupation", State of California Employment Development Department, Table 3.3.

"1980 Census of Population; Occupation by Industry Survey", U.S. Department of Commerce, Volume 2.

STEP 6: ESTIMATE OF EMPLOYEES MEETING VERY LOW INCOME DEFINITION

The number of households in each occupation category that meet the very low income criteria are estimated in Step 6. To accomplish this step, KMA first reviewed available wage survey data collected by the U.S. Department of Labor and the State of California Employment Development Department.

Overall, these sources did not provide enough comprehensive and detailed data for our needs; in the majority of cases data was available for only a select number of job types. As a result, we had to make judgements based on extrapolation of available data to estimate the percentage of households that have a wage earner making less than $17,050. This income level is set by HUD as the upper limit to qualify a household's income as very low income. This does not necessarily mean the household qualifies for assistance since the household must also meet household size criteria.

The most comprehensive wage data was found for office workers, particularly for clerical and professional/technical occupations. This survey data was accumulated by the

U.S. Department of Labor which conducts periodic surveys of occupational earnings for selected occupations in the Sacramento metropolitan area.

KMA's analysis of this survey data indicated that 56% of clerical office workers and 6% of professional/technical office workers earn less than $17,050. The employees in the professional/technical occupations earning less than $17,000 are in computer data entry jobs. Available wage data for other land uses and related occupational groups was less complete and provided data for only select job types, such as welder and cashier. KMA had to therefore make estimates of income distribution by occupation.

To estimate the percentage of households earning less than $17,050 in the craft/kindred, service, operative and laborer occupations, we have used the clerical wage data as a benchmark and have made adjustments relying on available wage data for selected job types in each of the occupational categories. This methodology introduces a potential source of error since the estimate of households earning less than $17,050 for each of these occupations is not based on a representative range of job types but rather on specific jobs types which may not adequately reflect the range of salaries in an occupation category. Additional research should be undertaken to see if more comprehensive wage data is available.

The percent of households earning less than $17,050 for each occupation are shown in the table on the following page. These percentages were applied to all six land uses.

	% Employee Households Earning Less Than $17,000
Professional/Technical/ Managerial	6%
Clerical	56%
Crafts/Kindred	35%
Operative	75%
Laborers	90%
Service	90%

The next step estimates the number of very low income households in each of the five very low income subgroups defined by HUD. For this step, we have again relied on clerical wage data. As previously discussed, this data is the most comprehensive and thus is utilized to estimate the number of very low income households in each of HUD's income subgroups. This is done for the crafts/kindred, operative, service and laborer occupational categories and applies to all land use categories. Table A-1 presents the distribution of households that fall in to these five income subgroups.

By using the clerical income distribution to estimate the number of households in each of HUD's five income subgroups, our estimates for the four occupational categories will either over or underestimate the number of households in each subgroup. Additional research is needed to obtain more comprehensive and detailed wage data for each occupation category.

Data Source: "Area Wage Survey, Sacramento, California Metropolitan Area", U.S. Department of Labor, December 1986.

"Sacramento Region Business Profile, Greater Sacramento Area", The Sacramento Area Commerce and Trade Organization, 1986.

"Annual Planning Information; Sacramento", State of California Employment Development Department, May, 1987.

STEP 7: ESTIMATE OF HOUSEHOLD SIZE DISTRIBUTION

HUD's criteria for assistance is dependent on a household meeting a combination of income and household size requirements. Step 7 estimates the number of households in each household size category ranging from one person per household to five persons or more per household.

Household size varies by income and age, so we utilized U.S. Census on data for non-elderly households with an income less than $15,000 in 1979 dollars. This income level is close enough to approximate HUD's $17,050 income level in 1987.

The following chart is a percentage breakdown of households under $17,050 by size:

Low Income Household Size	Percent
1	36%
2	28%
3	18%
4	11%
5 or more	7%

Date Source: "1980 Census of Population, Detailed Population Characteristics, California", U.S. Department of Commerce, Section 3, Page 6-2394.

STEP 8: ESTIMATE OF VERY LOW INCOME HOUSEHOLDS THAT MEET INCOME AND SIZE CRITERIA

This step calculates the number of households that meet HUD's very low income assistance criteria. Using the matrix shown on Table A-2, a probability factor is calculated for each of the five HUD income subgroups, such as for example households earning less than $12,650 with a household size of two. To determine the probability factor for each occupation category the five probability factors calculated for each HUD level are totalled. This number represents the probability that new households in a given occupation category will meet both income and household size criteria established by HUD. The probability factors for each occupation are presented below:

	% of Households that Meet HUD Criteria
Profession/Technical/ Managers	1.5%
Clerical	21.3%
Craft/Kindred	13.0%
Operative	29.0%
Laborer	38.0%
Service	35.0%

To determine the number of households that qualify for assistance the probability factors shown above are multiplied by the number of households by occupation estimated in Step 5. This is done for each land use category.

STEP 9: ADJUSTMENT TO ELIMINATE MOST MULTIPLE EARNER HOUSEHOLDS

This last step makes an adjustment to eliminate most of the households that have two or more earners such that the incomes in combination make the households no longer qualify as very low income. The U.S. Census tells us that overall 40% of the households have one wage earner but in the under $15,000 households, 70% have only one wage earner. Recognizing that there likely a significant share of multiple wage earner households that still do qualify (particularly among minority households where families may be large and skill levels low), we made the judgement to use a 75% factor.

This final adjustment produces the number of very low income households directly associated with the construction of 100,000 sq.ft. of building area by type.

Number of Households Requiring Assistance	x	% Adjustment to Eliminate Multiple Earner Households	=	Adjusted Number of Households Requiring Assistance

Data Source: "1980 Census of Population, Detailed Population Characteristics, California", U.S. Department of Commerce.

Table 1-A

HOUSEHOLD DISTRIBUTION

HUD's Income Categories	Professional/ Technical	Clerical	Craft	Operator	Laborer	Service
Less than $11,050	.2%	3%	2%	4%	5%	5%
Less than $12,650	1%	18%	11%	24%	29%	29%
Less than $14,200	2%	37%	23%	50%	60%	60%
Less than $15,800	4%	44%	27%	59%	70%	70%
Less than $17,050	6%	56%	35%	75%	90%	90%

Source: Keyser Marston Associates, Inc.
September, 1987

Table 2-A

VERY LOW INCOME HOUSING ASSISTANCE CLERICAL OCCUPATION

Household Size		DISTRIBUTION BY INCOME						
		Less Than $11,050	Less Than $12,650	Less Than $14,200	Less Than $15,800	Less Than $17,050	Total	
		(2.8%)	(18%)	(37.2%)	(43.8%)	(55.8%)		
Size	Distribution							
1	(36%)	1% (1)					1.0%	
2	(28%)		5% (2)				5.0%	
3	(18%)			6.7% (2)			6.7%	
4	(11%)				4.8% (2)		4.8%	
5	(7%)					3.9% (2)	3.9%	
Total	100%						21.4%	(3)

Table 2-A (Continued)

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(1) This number indicates 1% of all one person clerical households will earn less than $11,050 and thus qualify for very low income assistance. This percentage is calculated by multiplying the percentage of one person households (36%) by the percentage of households earning less than $11,050 (2.8%).
(2) Calculated using the same approach as in footnote one.
(3) Represents the percentage of clerical households that will meet HUD's very low income criteria.

Source: Keyser Marston Associates, Inc.
August, 1987

APPENDIX F

HEFNER, STARK & MAROIS
ATTORNEYS AT LAW
2710 GATEWAY OAKS DRIVE
SUITE 300 SOUTH
SACRAMENTO, CA 95833
TELEPHONE 925-6620
AREA CODE 916
Christina J. Savage
CA Bar Assoc. No. 78897-9
Joel S. Levy CA Bar Assoc. No. 99411-2
Howard S. Nevins CA Bar Assoc. No. 119366-3
ATTORNEYS FOR Plaintiffs and Petitioners

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

COMMERICAL BUILDERS OF NORTHERN CALIFORNIA, AND ITS AFFECTED MEMBERS, Plaintiffs and Petitioners, v. CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20, inclusive, Defendants and Respondents.	Case No. CIV 89-638 EJG DECLARATION OF DAVID WADE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT DATE: 9/8/89 TIME: 1:45 p.m. COURTROOM: No. 2

I, DAVID WADE, declare:

1. I am a principal and owner of Wade Associates, a consulting firm specializing in urban planning, including particular aspects of urban development involving planning, design and economics. I hold a B.S. degree in City and Regional Planning from California Polytechnic, San Luis Obispo, and a masters degree in Architecture and Urban Planning from U.C.L.A. (1978). I have been the principal planner and designer on several large area master plans ranging from 750 to 3,500 acres in size. Recent projects include the Southeast Roseville Specific Plan, the Northwest Roseville Specific Plan, the North Central Roseville Specific Plan, the Northwest El Dorado Hills and El Dorado Hills Specific Plans, (El Dorado County), and Stanford Ranch in Rocklin. I prepared the companion Design Guidelines for many of these master plans. I was part of the multi-disciplinary team that developed the planning and cost estimates for the Laguna Community Public Facilities Master Plan and the Antelope Community Public Facilities Master Plan. In both projects, I prepared the landuse analysis and the service projections and cost estimates for the "soft" public service components. I also prepared master facilities plans for several school districts and park districts and prepared fiscal impact analysis on several development projects. I served as Assistant Executive Officer, Sacramento County Local Agency Formation Commission, from 1978--1981, and as Assistant City Planner of the City of Novato from 1973—1976. I am past Director of the Sacramento Valley Section of the American Planning Association and a charter member of the American Institute of Certified Planners.

2. During the course of the City of Sacramento's consideration of a development fee to be imposed on non-residential construction to provide a trust fund for the construction of low income housing, I was hired by the Commercial Builder's Council of the Building Industry Association of Superior California, Inc., to study the memorandum prepared by Keyser Marston and Associates, Inc. ("KMA") in November, 1987. The memorandum, referred to hereinafter as the "KMA study, was described as a summary of a "preliminary analysis of the linkage between the development of various types of commercial and industrial buildings and very low income housing needs."

3. In reviewing the KMA study, I concluded that the study is a series of estimates and assumptions used to define a complex set of interactions. It does not include sufficient information to draw the conclusions made in the study. The nexus between job information and housing demand among low income groups is highly speculative. Consequently, the low income housing development fee is not substantiated on the basis of the analysis provided by KMA in its study.

4. Employers are attracted to an area by the availability of the suitable work force. Research on site location decisions for firms considering the Sacramento region indicate that the availability of the skill and labor forces rank as very important by 64% of the 128 respondents to the detailed survey conducted for the City of Sacramento. The same survey indicated that the potential employers rated housing availability and costs as one of the six best features of the Sacramento region compared to other potential locations in the United States.

5. A fundamental presumption underlying the development fee is that the creation of new jobs in Sacramento will induce low income households to relocate here to fill the employment opportunities. In fact, however, the availability of relatively low cost housing may be a far more significant factor than job availability. Households decide to relocate on the basis of economic factors including employment opportunity and housing cost. The employment opportunities for low skilled workers is likely to be greater in larger metropolitan areas than in Sacramento simply due to the larger employment base. Moreover, the income paid for a low level job is likely to be roughly comparable in any region in California although the housing prices will vary greatly. If an individual in another region already has housing, but is seeking a job at a relatively low skill level, the probability is that they will seek employment in their home region. However, if the opportunity arises to improve their quality of life by spending less for comparable housing in another location, then there will be an inducement to move. For very low income households, the availability of housing at lower cost may be an overriding determination in relocation decisions. This conclusion is consistent with a study of employment inmigration is South Placer County made by Anna Marie Roberts, *"Migration and Housing Demand in South Placer County"*, (1984). The study is based on detailed surveys of workers in all economic sectors conducted biannually since 1981 by the City of Roseville, in cooperation with the Placer County Manufacturers' Association and other jurisdictions in Placer County. Roberts found that first-wave immigrants to the South Placer Region tend to be

the higher-paid workers with special skills drawn by relatively higher paying positions. Again, the relative low cost of housing in the Sacramento region is often cited as a reason for relocating. Roberts found that the lower paying jobs were filled by workers who already live in the area and that migrants are usually married men with higher than average income and the sole wage earner in their household. Migrants are most frequently employed in professional and managerial positions representing a much larger proportion of the employees in these positions.

6. The KMA Study is structured on the implicit assumption that all employees are new employees to the County and that, "if the employees of this (new) building have relocated from other buildings, they will have vacated space somewhere else in the County and somewhere in the chain new employees will have come to Sacramento County to work." There is no evidence offered in the KMA study for this assumption regarding the ultimate occupancy of space in the County. The key point in this assumption is that the acknowledgement that any supposed linkage between the development of commercial buildings and housing need is very *indirect*. In the foregoing example, the occupants of new space incur a fee from which they derive only a remote benefit of increased low income housing supply. In contrast, businesses which occupy older space not affected by the fee will escape making any contribution to the community benefit of an expanded low income housing supply. Thus, a significant inequity is inherent in the proposed fee because the explicit purpose of the nexus analysis is to establish a precise fee on new construction based on a

presumed impact on the housing needs of the community. A limited telephone survey of commercial leasing brokers conducted by my firm indicated that much of the new space in Sacramento has been occupied by businesses already within the Sacramento region. In such case, businesses that already are part of the community, and which are presumably staffed by area residents, would be paying a fee that is disproportionate to the presumed benefit for that project.

7. The KMA study provides an adjustment for the presumption that all new workers in Sacramento County will also reside at the County. The study assumes that the percentage of workers who reside in the County is comparable to the percentage that was measured in the 1980 Census. The report notes that "on a preliminary judgmental basis, no updating was deemed necessary given the substantial percentage that both residential and non-residential development that is occurring in Sacramento County versus the other counties in the metropolitan area." In fact, substantial growth has occurred in neighboring counties and may well modify the distribution of jobs and housing within the region. South Placer County and the west slope of El Dorado County have experienced substantial growth within the last decade and all indications are that this growth will be the major thrust of growth within the region. The new development has, thus far, been primarily residential. Roseville and Stanford Ranch have attracted a significant number of notable employers, such as Hewlett Packard, NEC, Herman Miller, Ace Hardware, and 3-M, among others, but these employers have thus far generated a relatively small number of jobs. In contrast, the residential areas have

expanded rapidly with major new subdivisions in Roseville, Rocklin and Lincoln. The distribution of jobs and housing within the Sacramento region that existed in 1979 is an extremely questionable basis for calculating the fees set forth in the KMA study. The growth and employment opportunities in the neighboring counties are significant factors in the overall regional job/housing balance and distribution of workers and employment. The nexus study appears to significantly overstate the number of employees residing in Sacramento County, and would undoubtedly be even less accurate with respect to the City of Sacramento.

8. The KMA study utilizes the labor force participation rate as a proxy for estimating the level of new employment among current low income residents. The KMA study assumes that all employment categories and all economic sectors would absorb local employment by a uniform 15%, and there is no attempt to recognize what proportion of the expansion may be concentrated in one income group. The use of a uniform percentage of increase in labor force participation distorts the actual effect of new employment. The increase of labor force participation has come from second wage earners within a household, typically, but not exclusively, from the wife of a primary wage earner. Over the decades 1950 through 1980, the number of working wives increased by 276.1% nationally; the husband equivalent expanded by only 32.2%. The projection of woman's participation in the labor force through 1990 indicates that this trend will slow, but will continue to be significant.

9. The detailed components of the KMA study dealing with allocation of low income by household and

occupation are based entirely on assumptions and partial information. The low income group is distributed according to estimates and assumptions based on incomplete data. The number of employees within KMA's very low income definition is only a "judgment based on extrapolation of available data to estimate the percentage of households that have a wage earner making less than $17,050." The KMA study relies heavily on speculative relationships and assumptions that cannot be verified empirically, and are useful only for general planning purposes. The calculation does not, however, demonstrate a direct causal relationship between commercial real estate development and low income housing needs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Roseville, California, on this 10th day of August, 1989.

/s/ David Wade
DAVID WADE

(2)

No. 91-1556

Supreme Court, U.S.
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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WILLIAM H. ETHIER
COHN & BIRNBAUM, P.C.
100 Pearl Street
Hartford, CT 06103-4500
(203) 493-2200

Counsel of Record

April 22, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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The National Association of Home Builders (NAHB), et al., respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of Petitioners.

These *amici curiae* have received the petitioner's written consent to file this brief in support of

petitioner and have filed the letter of consent with the Clerk of this Court. The respondent city has not responded to our request for consent to file a brief in support of the petition.

The NAHB represents 157,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The International Council of Shopping Centers (ICSC) is the trade association of the shopping center industry. It has approximately 24,000 members worldwide and approximately 22,000 in the United States. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

The Association for Commercial Real Estate, formerly the National Association of Industrial & Office Parks, is a professional organization of more than 6,000 individuals engaged in owning, managing and developing office and industrial buildings in the United States and internationally. Its members include not only the nation's leading commercial real estate developers but also architects, brokers, master planners,

engineers, property managers, banks, insurance companies and other real estate financial groups.

The National Realty Committee represents the nation's leading developers, owners and financiers of income-producing real property. Its members include individuals and firms that design, plan, develop, lease, own, operate and finance income-producing real property, including office buildings, shopping centers, industrial buildings, warehouses and apartment buildings.

The National Multi Housing Council (NMHC) represents the country's larger and most respected multifamily rental housing firms. Its members are engaged in all aspects of the development and operation of rental housing including the ownership, building, financing, management, and conversion to condominium of such properties. The National Apartment Association (NAA) is an organization of local and state associations representing owners, builders, investors, developers and managers of multifamily properties. The NAA represents the interests of more than 200,000 multifamily professionals and the members of the NMHC and NAA together own and manage about one third of the nation's approximately 24 million rental housing units.

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is, therefore, of paramount importance to these *amici*, all non-profit trade associations, and our members. The actual availability of an appropriate remedy for the occasional government action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve

the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements including those that fail to substantially advance legitimate governmental interests. The latter type of governmental requirement is presented in this case by the city's demand that individual private property owners pay for society's costs of providing housing to low income persons. That affordable housing is needed by persons with low incomes is not the question. The question is whether this housing must be paid for by individual private property owners who happen to provide employment opportunities for low income people.

The NAHB has been before this Court as an *amicus curiae* or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions.[1] The NAHB and ICSC joined to file an *amici curiae* brief in *Lucas v. South Carolina Coastal Council*, No. 91-453, currently before the Court. The NAHB's brief was favorably cited in this Court's *Nollan* opinion, 483 U.S. at 840.

Nollan is at the heart of the present controversy. The attached brief is submitted to show the need to resolve the question of whether a fee exacted by the government from an individual, as a condition for using its own private property, is an unconstitutional

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[1] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

taking of private property when the fee is used for a legitimate public purpose but the individual does not directly, substantially or in any other reasonable and essential way contribute to the public's need to further such a purpose. These *amici* sincerely believe that the accompanying brief will assist the Court because our concerns are much broader than those of petitioners. Our members across the nation are faced with countless regulatory decisions on a daily basis that affect the use of privately held land. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses its arguments on the harm the City of Sacramento inflicts on its concerns, our brief addresses the broader mandates of takings law that should be applied against those government decisions that abuse private rights and cites authorities different from those in petitioner's brief.

For the above reasons, this Motion should be granted.

Respectfully submitted,

WILLIAM H. ETHIER
COHN & BIRNBAUM, P.C.
100 Pearl Street
Hartford, CT 06103-4500
(203) 493-2200

Counsel for *Amici*

April 22, 1992

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

This Court has repeatedly stated that a governmental action violates the takings clause of the Fifth

Amendment if the action does not substantially advance legitimate government interests. The leading application of this aspect of takings doctrine appears in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). This rule is essential to guard against governmental acts that would impose on individuals costs that properly belong with the public as a whole even though the individual has not been denied economically viable use of its property.

The City of Sacramento's "linkage fee" does not *substantially advance* a legitimate government interest. The city justifies its fee through a purported nexus between office construction and the city's affordable housing needs. This justification, while clever and imaginative, is far too tenuous to pass constitutional scrutiny. If it is allowed to stand, local governments will stampede to require payments of money from new projects to fund any and all types of government purposes. Indeed, governments at all levels would be free to contrive any nexus, no matter how flimsy, between an individual's proposed use of his or her land and the furtherance of a legitimate public purpose.

There is something horrific in the city's position that those who bring in businesses, create jobs and provide employment to low income people thereby create the burden that low income people admittedly shoulder to find decent and affordable housing. Something more than this slim reed must be required. Something more substantial is required by the Constitution's just compensation clause.

Conditioning the use of private land to effectuate a public purpose causes an irreparable harm when the proposed land use has no "essential nexus" to that

public purpose and the government does not compensate the owner for his or her loss. This harm must be redressed by the Constitution. *Nollan*, 483 U.S. at 837. Regardless of whether the unconstitutional condition involves the payment of a fee or dedication of land the condition should be struck down.

Planning for and acquiring the necessary land and capital to build adequate public facilities to support our cities and towns, such as affordable housing for people of less financial means, is an important goal in maintaining society's quality of life. But propositions that further those ends must respect the property rights of individuals. Anything short of that proper respect, as has occurred here, is repugnant to the higher considerations expressed in the Constitution. The Constitutional rights at issue in this case must be confirmed by this Court.

These *amici* respectfully request the Court to grant certiorari in order to evaluate, after plenary consideration of the issues presented, the appropriate nexus required by the Constitution's takings clause. It is our hope that after the Court reviews the case it will send anew the message to all governments that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

REASONS FOR GRANTING THE WRIT

I. THE QUESTION BEFORE THE COURT IS A SUBSTANTIAL FEDERAL QUESTION DESERVING OF THIS COURT'S SUPERVISION

A. The Fifth Amendment's Takings Clause, Which Ostensibly Prohibits Permit Conditions That Do Not Substantially Advance Legitimate Government Interests, Is In Jeopardy Of Becoming A Useless Limitation On Government Power

This Court has reiterated that a regulatory taking occurs if *either* the regulation or government action denies a property owner economically viable use of the property *or* the regulation or government act does not substantially advance a legitimate government interest. *Yee v. Escondido, CA*, No. 90-1947, slip op. at 1 (U.S. April 1, 1992); *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The importance of maintaining the distinction between these two takings tests is self-evident. There are occasions where a government's actions substantially advance legitimate government interests but nonetheless deny a particular landowner all economically viable use of the private property.[1] Likewise, there are situations, such

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[1] *See, e.g., Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161 (1990); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990); *Cf. United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985) (While upholding the Clean Water Act's grant of jurisdiction to regulate certain wetlands, the Court noted that a property owner can still bring a takings claim in U.S. Claims Court if a dredge or fill permit is applied for and denied and the "effect of the denial is to prevent 'economically viable' use of the land in question").

as in this case, where a government's actions do not deny a landowner economically viable use of the property but nonetheless do not substantially advance a legitimate government interest. *Nollan*, 483 U.S. 825; *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260 (1991). These two tests are an important part of this Court's effort to protect individuals in situations where it would be unfair to impose costs on an individual that properly belong with the public. *Cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the Just Compensation Clause bars forcing on some people alone those "public burdens, which, in all fairness and justice, should be borne by the public as a whole."). *See also, Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1065-66 (N.Y. 1989).

The Court does not have before it an allegation that the city's actions will deny economically viable use of property. The issue presented is whether the city's demand that the property owner pay for low income housing (on the basis that the property owner creates jobs for low income persons) substantially advances, in the Constitutional sense, the city's legitimate interest in providing such housing. "[T]he determination that there has been a taking 'ultimately calls as much for the exercise of judgment as for the application of logic.' " *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 160 (1990) (*citing Andrus v. Allard*, 444 U.S. 51, 65 (1979)). Here, the petitioner who uses its property in a way that creates jobs is penalized by the forced payment of fees into a public fund that supports the housing costs of those who might fill these jobs. Can this be the concept of fairness and justice embodied in the Fifth Amend-

ment? If it is, then this Court's 1987 *Nollan* decision, after only a few years, is collapsing under the weight of lower court interpretations, and the "substantial advancement of legitimate government interests" takings test has become meaningless.

B. Sacramento's Linkage Fee Requirement Does Not Meet The Essential Nexus Requirement This Court Established In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

This case is very much like the *Nollan* case, where the Court admonished the government for its attempt to compel a property owner to contribute to the realization of an easement, even though the government "may well be right that [the easement] is a good idea." *Id.*, 483 U.S. at 841. The Court stated in *Nollan*, 483 U.S. at 842, that if the government "wants an easement across the Nollans' property, it must pay for it." Similarly here, Sacramento may well be right that providing assisted housing for low income persons is a good idea. But, if the city wants to provide such housing, *it* must pay for it.

These *amici* believe this Court's opinions stating that a government's actions must "substantially advance a legitimate government interest" mandates, in the takings context, a direct connection between the government action and both the burden the individual places on the community and the benefits the individual will receive from the government action. In reviewing this direct connection (the Court's "essential nexus," *Nollan*, 483 U.S. at 837) the Court has stated that it requires more than the standard applied in due process or equal protection cases. *Nollan*, 483 U.S. at 834 n.3. The traditional due process standard that says "the State 'could rationally have decided'

the measure adopted might achieve the State's objective" is not sufficient when analyzing government actions under the just compensation clause. *Id.*

Where the government requires a property owner to pay a fee that has little, if any, connection (and certainly no direct, substantial or essential connection) to the relevant burdens imposed on the community by the owner's proposed land use or a fee that will not benefit the proposed land use in some direct, substantial or essential way, the government fee must be struck down as transgressing the limitations imposed upon it by the takings clause.

We recognize that the takings clause does not require that development exactions and fees be precisely tailored to the burdens and benefits attributable to the property being assessed. See, for example, the specifically and uniquely attributable test employed by some courts to evaluate impact fees. *Rosen v. Village of Downers Grove*, 167 N.E.2d 230 (Ill. 1960); *Pioneer Trust and Savings Bank v. Village of Mount Prospect*, 176 N.E.2d 799 (Ill. 1961); *Frank Ansuini, Inc. v. City of Cranston*, 264 A.2d 910 (R.I. 1970). But, the decision below, which equates the takings analysis with the extremely deferential due process level of scrutiny, is the other extreme. In disputing the petitioner's claim that *Nollan* requires more than a "due process" basis to support the city's asserted nexus, the Ninth Circuit below states that "*Nollan* holds that where there is *no evidence* of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (emphasis added). In other words, according to

the Ninth Circuit's reading of *Nollan*, only a scintilla of evidence is necessary to support a constitutional nexus. We find this remarkable. How can the Ninth Circuit rationalize its statement with this Court's words?

> "[O]ur opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, . . . not that the 'State "could rationally have decided" the measure adopted might achieve the State's objective.' "

Nollan, 483 U.S. at 835 n.3 (citing cases). Yet, the Ninth Circuit says it is "not persuaded that *Nollan* materially changes the level of scrutiny" that must be applied to the ordinance at issue. *Commercial Builders*, 941 F.2d at 874. With respect, the nexus required in a "substantial advancement" takings case is something more than the Ninth Circuit would have us believe. Our view *does not* make the due process clause meaningless. There will be situations where the nexus tied to a regulatory requirement is sufficient to withstand the higher level of scrutiny demanded by the takings clause yet, nonetheless and for non-nexus reasons, the regulation is otherwise arbitrary, capricious or unreasonable and subject to a due process claim.

II. THIS CASE REFLECTS A LOCAL LAND USE PRACTICE THAT CLAMORS FOR THIS COURT TO REITERATE ITS ADMONITION THAT THE GOVERNMENT MUST RESPECT THE CONSTITUTIONAL RIGHTS OF INDIVIDUAL CITIZENS WHEN REGULATING PRIVATE ACTIONS PURSUANT TO ITS POLICE POWERS

It has been a long-standing governmental practice to demand land (e.g., development exactions and land dedications) or money (e.g., impact fees and fees in lieu of dedications) from property owners who propose to build on their land. See, for example, Bauman & Ethier,*Development Exactions and Impact Fees: A Survey Of American Practices*, 50 Law & Contemp. Problems 51 (1987), and authorities cited therein. Linkage fees, *see* Petition for Certiorari at 7 - 12, are the next step beyond impact fees in the evolution of charges on new development.[2] But few developers and builders litigate when municipal governments unfairly and unconstitutionally exact fees and property that have little relation to the services or benefits provided to a proposed project or the burdens placed on the community by the project. These entities are entrepreneurs and businesses that simply find it impractical in almost all cases to challenge unconstitutional government requirements. It does not take a rocket scientist, therefore, to understand why much of the

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[2] Sadly, linkage fees are not the latest step in this evolutionary process. Most recently, "development excise taxes" have been enacted and proposed in several towns across America where the fee to be used for public uses is imposed on the alleged privilege of pursuing development. These governments assert that no nexus, not even a rational nexus, is required to support these fees. *See* Ethier & Weiss, *Development Excise Taxes: An Exercise In Cleverness And Imagination*, 42 Land Use L. & Zoning Digest 3 (No. 2 Feb. 1990).

impact fee and exaction litigation nationwide has been brought by their organized membership trade associations rather than the individual property owners. However, these associations with their limited resources must pick their fights carefully. Consequently, many of the demands and exactions imposed on individuals by local governments go unchallenged.

In a national symposium on development exactions, Professor Babcock, the dean of American land use law, cited examples of abusive exactions and followed with this discussion:

> In each of these cases one can imagine the initial reaction of the "extractee" - outrage. In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?
>
> The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.
>
> By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of interest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Babcock, *Foreword to Exactions: A Controversial New Source For Municipal Funds*, 50 Law & Contemp. Problems 1, 2 (1987). *See also* Taub, *Exactions, Link-*

ages, and Regulatory Takings: The Developer's Perspective, 20 The Urban Lawyer 515, 518 (1988) ("The fact that developers are willing to pay suggests the power of the local government's position, not the reasonableness of the exaction.").

Local governments are often well aware of the amount of time, money and other resources a builder of a large development (or even, in relative terms, of a single house) has invested in a project before the first application for approval is submitted. Local governments are usually free to exercise their municipal leverage to extract all types of property interests and money from project applicants. Only occasionally will courts scrutinize the exercise of this municipal leverage in ringing terms:

> While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create - i.e., greater needs for municipal services and facilities -, the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.

Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976);

> We have no doubt the municipality was conscious of the illegality of what it did and for that reason refrained from adopting an ordinance, seeking instead to achieve its ends through the guise of "voluntary" contributions with spurious "agreements" to make them stick.
>
> Defendants argue that even if the payments were illegally extorted, as we think they were, nonetheless plaintiff ought not recover . . . .
>
> . . . .
>
> Defendants' position boils down to the proposition that one who buys with notice of municipal lawlessness thereby becomes bound by it. Thus understood, defendants' position is frivolous.

West Park Ave., Inc. v. Township of Ocean, 224 A.2d 1, 4-5 (N.J. 1966);

> Regulation H requires the dedication of seven-and-one-half per cent of the total land comprising the subdivision without any consideration of the town's need for the land. Moreover, there is evidence, that was improperly excluded, which indicates that some developers would be permitted to pay the town the value of the land in lieu of its dedication. This appears to us to be an out-and-out plan of extortion. . . .

J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981); *see also Nollan*, 483 U.S. at 837.

The just compensation clause is one of the few constraints on the public's use of its regulatory powers over the use of an individual's land. Its full application is needed by property owners of all types to provide some balance to weigh against a municipality's leverage.

As difficult as a takings challenge is for the property owner, the just compensation clause should remain a fundamental crutch to support the property owner in fighting the heavy-handed leverage brought to the table by the municipality. The Ninth Circuit's opinion below fatally damages this constitutional crutch.

These *amici* do not mean to suggest that all local governments—counties, cities and towns—are ruthless and unreasonable in conducting the affairs of their daily land use decision making processes, although at times in the trenches of local planning board hearings it appears so from the project applicant's viewpoint. Many, if not most, local governments are reasonable and sincere in their efforts to promote the public's health, safety and welfare. But while it is our view that too many communities disrespect Constitutional considerations for the sake of political or financial expediency, if only one community forsakes one of its citizen's rights, the Constitutional damage is done and we are all worse off because of it. It is exactly because of these situations that Constitutional doctrine must be developed to protect individual rights, including property rights. The courts must step in to correct the constitutional damage and restore fairness and justice.

Property owners and builders are loathe to sue the government because the costs of litigation and delay

outweigh the costs of complying with the government's unconstitutional demands. Also, the same governmental agency a builder sues today has to provide the necessary permits on the next project the builder wants to undertake tomorrow—a very uncomfortable position in which to put yourself. Another compelling reason property owners refrain from litigating is that most are financially incapable of sustaining such a lawsuit. Therefore, it is vitally important that this Court grant certiorari rather than wait and see how the issue develops in future cases. Practically speaking, there very well may be no future "linkage" fee cases if the Ninth Circuit's decision is allowed to stand. Counsel would be hard pressed to advise any permit applicant to pursue any linkage fee litigation and these unconstitutional permit conditions will crush merrily forward.

III. THE PROPER CONSTITUTIONAL BALANCE BETWEEN LEGISLATIVE POWER AND JUDICIAL DEFENSE OF INDIVIDUAL RIGHTS DEMANDS THAT THIS CASE RECEIVE PLENARY CONSIDERATION BY THE COURT

This Court has eloquently stated that the legislature is the domain for identifying the public's interest in legislation.

> An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the

> public needs to be served by social legislation
>
> . . . .

Berman v. Parker, 348 U.S. 26, 32 (1954). With equal, if not greater force, however, the judiciary must remain the guardian of individual and property rights. The legislature defines the scope of the public's interest, but when individual property rights are destroyed to further those interests, the courts must step in. The role of the courts is to define when the government has gone too far and insure that adequate remedies exist to redress the individual's loss. The Ninth Circuit failed to exercise its duty of supervision in the conflict between the public's interest and the private property owner's rights.

While the takings clause *in general* does not act to prohibit transfers of wealth deemed appropriate by the majoritarian branches of government, courts ought to be suspicious of governmental actions that affect a narrow class of individuals as such actions can be taken without the usual political constraints. Justice Scalia recognized this danger in *Pennell v. City of San Jose*, 485 U.S. 1, 21-23 (1988) (Scalia, J., dissenting). Thus, when wealth is exacted from a narrow class of individuals, as here, the takings clause should wield its power to limit governmental actions.

This Court warned that it would be particularly careful about the adjective "substantial" in the substantial advancement takings test where "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. Similarly here, to admonish the cleverness and

imagination of local governments, this Court should demand that lower courts be particularly careful about the level of nexus allowed to justify a project fee where the payment of the fee is made a condition to the lifting of a land-use restriction or the issuance of a permit. In this context too there is heightened risk that the government's intent is to avoid placing payment for its police power purpose on the public as a whole. "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

The Court has noted that

> many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S., at 416.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321- 22 (1987). The context of the present case is a perfect vehicle within which the Court may elaborate on and reaffirm these just compensation clause principles.

Local government decisions, such as those below, that vitiate federal Constitutional guarantees must be

reversed. Property owners and builders, who are in an excruciating minority position when it comes to local government land use controls, have nowhere else to turn. The regulated and, we presume, most of the regulators await with hope for more United States Supreme Court guidance on this critical issue.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, this Court is urged to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

WILLIAM H. ETHIER
COHN & BIRNBAUM, P.C.
100 Pearl Street
Hartford, CT 06103-4500
(203) 493-2200

Counsel for Amici

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

SHARON SIEDORF CARDENAS
TED KOBEY, JR.
Office of the City Attorney
City of Sacramento
921 Tenth Street
Seventh Floor
Sacramento, CA 95814
(916) 264-5346

MARC B. MIHALY *
ALLETTA D'A. BELIN
RICHARD S. TAYLOR
SHUTE, MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Counsel for Respondents

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Where the uncontradicted evidence before the City of Sacramento demonstrated that new commercial development in the City is the most significant cause of the increased demand for new low-income housing, did the City violate the takings clause of the Fifth Amendment of the U.S. Constitution by requiring commercial developers to pay a fee to partially offset the increased burden on the city attributable to that development?

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IN THE

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COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

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v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondents City of Sacramento and Council of the City of Sacramento respectfully request that this Court deny the petition of Commercial Builders of Northern California (hereinafter "petitioner") for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Respondents City of Sacramento and Council of the City of Sacramento (hereinafter "respondent," "city") present the following Statement of the Case to supplement that presented by petitioner. Petitioner's statement omits most of the evidence of nexus before the City, the fact that this evidence was uncontradicted, the legislative fact-finding process by which the City adopted the ordinance under review, and the district court's rulings on state law claims relevant to these proceedings. Petitioner's statement also mischaracterizes the Ninth Circuit's ruling.

A. The 1989 Housing Trust Fund Ordinance

Sacramento's Housing Trust Fund Ordinance (Zoning Code of the City of Sacramento, Section 33, hereinafter "ordinance") establishes a mechanism to help offset the burden imposed on the City's affordable housing program by new low-income workers moving to the City to fill jobs in new commercial buildings.[1] The ordinance imposes fees on six categories of new non-residential development. Ordinance § 33.C.1 (Pet. at D-17). Projects presenting special circumstances or which will involve few employees may apply for a variance exempting them from the fee requirements. Ordinance § 33.F (Pet. at D-28).

The fees range from $.25 to $.95 per square foot, generally less than half the amount which could have been justified based on the extent to which the particular type of development contributes to the increased demand for affordable housing. Ordinance Appendix A (Pet. at D-32; Clerk's Record ("CR") 26 at 927-929).[2] This approach shifted the burden of any uncertainties in the already conservative nexus calculations away from commercial developers to the public at large. The fees imposed under the ordinance will yield less than nine percent of the total cost of the City's low-income housing program. CR 27 at 1190. Taxpayers at large, block grants, and loan guarantees will pay the remaining nine-tenths of the cost. *Id.* The fees may be spent only on affordable housing developments close to the commercial projects charged the fees to insure that the increased housing opportunities are available to low-income workers employed in those projects (the

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[1] The ordinance applies to all non-residential buildings such as offices, hotels, research and development facilities, retail centers, manufacturing facilities, and warehouses. Ordinance Appendix A, petition (hereinafter "pet.") at D-17. For convenience, these structures are referred to herein as "commercial buildings" or "commercial development."

[2] All citations to the Clerk's Record refer to the volume and page number of the clerk's record in the district court.

"geographic nexus" requirement). Ordinance § 33.B.5 (Pet. at D-15).

B. State Restrictions on Local Government Fees

In 1987, in response to the concerns expressed in this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the California legislature adopted statutory restrictions on development fees imposed by government agencies. This legislation (known as Assembly Bill 1600 and referred to hereinafter as "AB 1600") was intended to protect landowners from being singled out to bear public burdens and to ensure that all local governments complied with *Nollan*'s requirements that land use regulations substantially advance a legitimate state interest.[3] AB 1600 allows local governments to impose development fees only where they have made certain findings and have complied with specific procedures. As Sacramento's ordinance was adopted pursuant to these requirements, they are important to an understanding of this case.

AB 1600 forbids imposition of any development fee unless the local government has demonstrated a cause-and-effect relationship between projects subject to the fee and the problem to be addressed; it must make specific findings that there is a reasonable relationship between:

(1) "the fee's use and the type of development project on which the fee is imposed" (Cal. Gov't Code § 66001(a)(3));

(2) "the need for the public facility [financed by the fee] and the type of development project on which the fee is imposed" (Cal. Gov't Code § 66001(a)(4)); and

(3) "the amount of the fee and the cost . . . of the portion of the public facility attributable to the development on which the fee is imposed." (Cal. Gov't Code § 66001(b)).[4]

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[3] Codified at sections 66000-66003 of the California Government Code and reproduced in its entirety in Appendix A to this brief.

[4] The City's compliance with these requirements is not before the Court. As discussed in part D, *infra*, the district court determined

In addition, local governments must identify the specific purpose of the fee and the use to which the fee will be put. Cal. Gov't Code § 66001(a)(1), (2). To ensure that fees are not diverted to the local government general fund, AB 1600 further requires that all fees and interest thereon be maintained in a separate fund or account. Cal. Gov't Code § 66001(c). If a development fee is not expended or committed within five years, the local government must make further findings each year thereafter to demonstrate a continuing reasonable relationship between the anticipated use of the fee and the purpose for which it was imposed. Cal. Gov't Code § 66001(d). If this finding cannot be made, the local government is required to refund the fee. Cal. Gov't Code § 66001(e).[5]

C. Preparation and Adoption of the Housing Trust Fund Ordinance

Sacramento adopted its Housing Trust Fund Ordinance after two years of study, public meetings, and hearings. The ordinance was one of a package of recommendations put forth by a housing Task Force appointed by the City and Sacramento County in April, 1987.[6] The Task Force was directed to assess the need for increased low-income housing in Sacramento, to establish reasonable construc-

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that the City complied with these requirements and that determination was not appealed.

[5] Petitioner challenged the City's compliance with other provisions of the Government Code requiring that fees and exactions "not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed," Cal. Gov't Code § 66005(a), and that any fee or exaction which does exceed the reasonable cost must be treated as a special tax subject to the provisions of California's "Proposition 13" (Article XIII A, section 4 of the California Constitution). Cal. Gov't Code § 50076. The district court determined that the City had complied with these requirements and that determination was not appealed.

[6] The Task Force was composed of members representing all sectors of the community, including commercial developers, the Chambers of Commerce, and the Board of Realtors. CR 27 at 1179.

tion targets to meet that need, and to recommend appropriate financing mechanisms. CR 25 at 1. After approximately thirty public sessions, the Task Force developed an affordable housing construction program and recommended a public/private financing strategy to address both existing and new housing needs. The program to address new needs included the fee ordinance at issue here. CR 26 at 788-89, 897-939.

During the course of the Task Force investigations, this Court issued its decision in *Nollan*. Shortly thereafter, the California legislature incorporated the principles of *Nollan* in Assembly Bill 1600 as described above. *Nollan* and AB 1600 greatly influenced the work of the Task Force. To ensure that its recommended funding mechanisms for low-income housing would be consistent with the *Nollan*/AB 1600 nexus requirement, the Task Force commissioned the consulting firm of Keyser Marston Associates, Inc. (hereinafter "Keyser Marston")[7] to determine the extent of the relationship (if any) between the increased demand for low-income housing and new commercial development. CR 27 at 1041.

In late 1987 Keyser Marston gave its initial report to the Task Force. Pet. at Appendix E. Keyser Marston's report, a supplement, and subsequent testimony set forth the nature and extent of the cause-and-effect relationship between new commercial development and increased demand for low income housing. Keyser Marston explained that new job creation is the primary cause of population growth in Sacramento and that this growth is accompanied by growth in the number of low-income households. CR 29 at 1950. Keyser Marston also demonstrated the link between new jobs and new commercial space. It noted that new jobs could not be created absent commercial de-

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[7] The Task Force selected Keyser Marston based on the firm's experience on behalf of commercial developers in Sacramento and experise in real estate and urban economics. CR 27 at 1355-56; Declaration of Kate Funk, CR 42 at Ex. C. The Task Force wanted to be certain that the consultant's economic analysis recognized the unique factors affecting project economics in the Sacramento region. *Id.*

velopment to house those jobs and described the decline in employment in cities such as San Francisco which had constrained development of commercial space. CR 29 at 2224, 2233. Keyser Marston then described how each new building would contain a predictable number of workers and, depending on the nature of the commercial activity in the building, a certain number of low-income workers. Pet. at E-3 - E-4. These new workers contribute to the increased demand for affordable housing. Accordingly, Keyser Marston quantified the expected increase in demand for affordable housing based on the number of new very low income households likely to be attracted to the City by development of each of six building types. Pet. at E-1 - E-10. Keyser Martson made a number of conservative assumptions to avoid overstating the increase in demand and to err, if at all, on the side of understating the demand. *Id.*; CR 29 at 1951, 2225-6.

Keyser Marston then translated this increase in demand into a dollars and cents figure representing the level of mitigation fees that would be necessary to respond to the increased demand for low-income housing generated by new development. This calculation represented a "pure nexus" amount—the maximum justifiable charge to each type of commercial development based on its relative contribution to the increased demand.[8] Pet. at E-18.

Finally, to account for any errors in its analysis and to ensure that the fee did not impose an excessive burden (less than 1-3 percent of total construction costs), Keyser Marston also calculated reduced fee amounts ("adjusted fees"). Pet. at E-14, E-21. These adjusted fees were generally less than one-half the "pure nexus" amounts.

In June of 1988 the Task Force submitted its report which included Keyser Marston's work. CR 26 at 788. After holding three public workshops and hearings to con-

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[8] Subsequent studies and testimony to the City Council indicated that this figure underestimates the necessary subsidy attributable to commercial development by as much as a factor of two. CR 29 at 2225; Declaration of Kate Funk, CR 42 at Ex. C.

sider the Task Force report, the Planning Commission and Sacramento Housing and Redevelopment Agency ("SHRA") recommended approval of the fee ordinance. CR 27 at 1372-1375. Two subcommittees of the Sacramento City Council then heard testimony and received additional reports from staff and Keyser Marston at three public meetings between November, 1988 and February, 1989. CR 27 at 1466-1654; CR 28 at 1796-1945. At the Council's request, Keyser Marston then prepared a supplemental report which explained how its study had established a clear linkage between new non-residential development, greater employment opportunities, and low income housing demand, while taking all variables into account. CR 27 at 1621-1635; CR 28 at 1812-1832, 1934-1945; CR 29 at 1950, 2221-2228.

On March 7, 1989, the full City Council reviewed the factual record, considered Keyser Marston's supplemental report, and heard additional testimony from Keyser Marston and the public. CR 29 at 2182-2317. At the conclusion of the hearing, the City Council adopted the ordinance including the specific findings required by AB 1600.[9] The fees adopted were set at or below the "adjusted fee" levels calculated by Keyser Marston, well below the "pure nexus" amounts justified by the costs attributable to the new development. *Compare* Pet. at D-32 with Pet. at E-21.

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[9] An index to the 2000-page administrative record is included in appendix B to this brief (Volumes I-V of the administrative record correspond to volumes 25-29 of the clerk's record). In addition to a number of city planning documents and environmental reports, the ordinance was developed based primarily on: discussions at approximately thirty meetings of the Joint City-County Task Force (CR 26 at 788); the Task Force Report (CR 26 at 788-1005); city staff reports (CR 27 at 1147-1229); a commissioned "nexus study," the Keyser Marston report (CR 27 at 1041-1065); a supplement to that report (CR 28 at 1812-1832); extensive testimony before the City by City staff, Keyser Marston, and others; and substantial discussion among City planning commissioners and councilmembers (*see, e.g.*, CR 27 at 1256-1376 (Planning Commission) and CR 29 at 2180-2318 (City Council)).

Throughout these proceedings, neither the petitioner nor anyone else presented the Task Force, the Planning Commission, SHRA, or the City Council with evidence challenging the factual data or assumptions in the nexus reports and testimony prepared by Keyser Marston and City staff. Petitioner opposed the ordinance primarily on policy grounds unrelated to this action.[10] Although petitioner argued that commercial developers should not be required to contribute to solving the housing problems attributable to the workers in their buildings, it provided no studies or facts to contradict the evidence before the City. CR 28 at 1925-1934.

Since the City adopted the ordinance it has continued to study the link between new commercial development and increased demand for affordable housing. In April, 1990 the City and Sacramento County sponsored a study by Keyser Marston to update its 1987 analysis. Keyser Marston Associates, Inc., *Economic Nexus Analysis: Housing Linkage Fee City and County of Sacramento*, April 1990. This led the County to adopt a similar trust fund ordinance to enable the City and County to coordinate their response to the affordable housing problem and to refine the geographic nexus requirement through creation of a City/County zone system. Sacramento County Code, Chapter 16.89. The City also sponsored an additional study in September, 1990 to ascertain appropriate fee levels for non-residential projects falling outside the range of building types addressed in the original ordinance. Keyser Marston Associates, Inc., *Supplemental Report: Economic Nexus Analysis Housing Linkage Fee*, September 1990. On March 31, 1992 the City amended its ordinance to adjust the fee levels, establish a seventh project category, clarify the type of projects falling within each of the categories,

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[10] Petitioner's objections included concerns that the fee would raise project development costs, drive development out of the City, and change the character of the Sacramento economy. CR 27 at 1535-1545, CR 28 at 1921-1925.

and adopt the City/County zone system. City of Sacramento, Ordinance No. 92-014.

D. District Court Opinion

On April 8, 1989, petitioner filed this lawsuit alleging that the ordinance violated provisions of the United States and California Constitutions and several state statutes, including AB 1600. The district court granted the City's motion for summary judgment on all causes of action and denied petitioner's cross-motion for summary judgment. Pet. at App. B. On the takings issue raised in this petition, the district court found that the Task Force and Keyser Marston reports, staff reports, and oral testimony received by the City Council demonstrated "a substantial nexus between new commercial development and increased demand for low income housing." Pet. at B-5. The court further found that the fee amounts were calculated in a careful and sophisticated manner which erred, if at all, on the side of setting fees too low. Pet. at B-6.

E. Ninth Circuit Opinion

Petitioner appealed only the district court ruling on the takings claim, letting stand all other rulings, including the holdings that the ordinance complied with the requirements of AB 1600 and that the fee did not exceed the costs of meeting the low income housing needs of new employees created by new commercial development. Civil Appeals Docketing Statement (9th Cir.) (No. 89-16398), November 29, 1989, at 3. The Ninth Circuit affirmed the district court judgment. Pet. at App. A. It found on the record before it that the City's extensive review process had established "a substantial connection between development and the problem to be addressed." Pet. at A-7. The court discussed the City's findings regarding the relationship between commercial development and increased demand for affordable housing, the City's conservative assumptions, and noted that the fee represents only a small portion of the City's overall affordable housing program. Judge Beezer dissented from the court's opinion.

On January 7, 1992 the Ninth Circuit rejected petitioner's petition for rehearing and suggestion for rehearing en banc. Pet. at App. C.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW; THE CITY'S LEGISLATIVE DETERMINATIONS SATISFY THE REQUIREMENTS OF THE TAKINGS CLAUSE.

The reasons to deny petitioner's request for certiorari begin and end with the facts of this case—facts omitted by petitioner in its search for a rhetorical theme to catch the eye of this Court. Sacramento set out from the start to comply with the mandates of *Nollan*. The central fact of this case, which was uncontradicted in the abundant record made before the City, is that there is a direct cause-and-effect relationship between new commercial development and increased burdens on the City's low-income housing program. Petitioner promised to provide contrary evidence and studies, but never produced them; the evidence of nexus remained uncontradicted. The record also demonstrated that commercial developers benefit from the availability of an adequate stock of low-income housing. Sacramento did not adopt the ordinance until it had concluded that the evidence showed that the standards of *Nollan* and AB 1600 had been met and exceeded. These facts belie petitioner's claim that the City acted as if *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) did nothing to elevate judicial scrutiny of regulatory takings beyond a traditional "rational basis" test. Pet. at 7. Indeed, the City's factfinding satisfies even *de novo* scrutiny.

The undisputed record before the City made clear that new commercial development was by far the most significant cause of demand for new low-income housing. In light of these facts, simple fairness required that

commercial development shoulder part of the burden it created, rather than having the entire cost placed on taxpayers at large. As with most land use regulations, the Housing Trust Fund Ordinance is based on the inescapable fact of urban life that although development may bring certain benefits to a community (e.g., jobs) it also can bring certain costs (e.g., traffic congestion, pollution and increased demands on city services such as sewage, parks, and affordable housing). Like development fees imposed to address these other costs, the ordinance here is a well-reasoned response to a complex local problem.

A. The City Established a Cause-and-Effect Relationship Between Commercial Development and Demand for Affordable Housing as Required by the Takings Clause and *Nollan*.

The City's factfinding was carefully focused on the requirements of *Nollan* and AB 1600. The Keyser Marston reports and testimony established that new commercial buildings and the jobs they house are the driving force behind population growth in Sacramento. 29 CR 1950. Keyser Marston also demonstrated that despite the public image of office buildings filled with white collar workers, the vast majority of new jobs associated with new commercial development are low-paying jobs.[11] *Id.*; see also CR 26 at 862. Thus, an increase in jobs in Sacramento will be accompanied by an increase in job holders who cannot afford market-rate housing and will place in-

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[11] For example, the Task Force found that an experienced clerk/typist in Sacramento may earn as little as $8,320 per year. Other low-paying jobs include cashiers, bookkeepers, dental assistants, bank tellers, and electronics assemblers. CR 26 at 863. Thus, while the creation of jobs may provide some benefit to poor people in general, in places such as Sacramento where a large fraction of those jobs do not pay enough to allow the workers' families to afford market rate housing, those new jobs will *exacerbate* the need for low-income housing in the vicinity. CR 26 at 862; CR 29 at 1950-1951.

creased demands on the City's affordable housing program.[12] *Id.* After the City quantified that increased demand, the ordinance set fee amounts well below the amounts resulting from that quantification. The ordinance also required that the new low-income housing be geographically related to the new commercial development. Ordinance § 33.B.5 (Pet. at D-15).

Notwithstanding all this evidence, petitioner makes the extraordinary assertion that the evidence before the City "utterly fails to establish a cause-and-effect relationship" between commercial development and the need for new low-income housing. Pet. at 13. Petitioner appears to base its claim on one phrase taken out of context from Keyser Marston's work—the caution in the first nexus report that it did not "make the case that building construction is responsible for growth." Pet. at 14. As the district court and the Ninth Circuit recognized, the body of Keyser Marston's reports and testimony make clear that this statement means merely that building construction is not the *sole* cause of growth. *See, e.g.*, CR 27 at 1622-1628; CR 29 at 1950-1952, 2221-2234. While acknowledging that a complex web of factors affect migration of low-income households, Keyser Marston emphasized that in mature, growing and diversified economies such as Sacramento, new employment opportunities are the leading cause of increased demand for housing:

> people do not come to a region like Sacramento because there is affordable housing or just because of it. They come because there are jobs here.

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[12] Contrary to petitioner's argument (Pet. at 5), the City has not assumed that the low-income workers employed in the new commercial buildings must be new migrants to Sacramento. Keyser Marston demonstrated that it is not important which workers actually occupy the new development; a "chain effect" ensures that if existing workers move to the new space, new workers will be attracted to the space vacated by existing workers. CR 29 at 2222. Thus, new development ensures that new low-income workers will come to Sacramento, regardless of which particular buildings they occupy. Petitioner's expert agreed with this finding. CR 28 at 1932.

> And most people, especially low-income people—for most people, no housing is affordable without a job. And that says that you have new [jobs] generating a need for new housing, including low-income housing.

CR 29 at 2223-2224. Thus, in contrast to simpler economies such as resort or retirement communities where housing itself is the major economic engine, in Sacramento the chain of causation begins with jobs. CR 29 at 2221-2234.

In the trial court petitioner conceded that new employment opportunities are one of the reasons that people move to Sacramento. Declaration of David Wade (hereinafter "Declaration"), Pet. at F-3.[13] Yet, in its petition to this Court, petitioner argues that the record before the City did not establish a cause-and-effect relationship. Pet. at 13. Petitioner accomplishes this sleight of hand by equating a "cause-and-effect relationship" with *sole* causation. In other words, because the evidence did not demonstrate that employment growth is the *only* cause of increased demand for low-income housing, but only the most significant among several causes, petitioner argues that *no* cause-and-effect relationship has been demonstrated. Petitioner's true claim, therefore, is not that no causation has been shown, but rather the novel proposition that a fee is impermissible absent a conclusive showing that the underlying activity is the *exclusive* cause of the problem to be addressed by the fee.

Petitioner's "single causation" theory is without merit. In today's complex urban settings virtually no impact is the result of a single cause. Petitioner apparently believes that any public agency that is forthright enough to admit that fact should be barred from imposing fees. In fact, the very cases on which petitioner relies through-

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[13] The Wade Declaration is discussed in detail in Section I. B, *infra*.

out its briefs recognize that *contribution* to a social problem is the litmus test, rather than petitioner's proposed "single causation" standard.

In *Nollan*, for example, this Court indicated that if the Nollans and other landowners had "contributed to" a problem, a fee to pay for remedying the problem would not be unconstitutional as long as it did not single anyone out disproportionately. 483 U.S. at 835, n.4. The Court further indicated that a permit condition directed at remedying a problem shown to be caused by the applicant "by reason of the cumulative impact with other construction" would not violate the takings clause. 483 U.S. at 835. Similarly, in his dissenting opinion in *Pennell v. San Jose*, 485 U.S. 1, 23 (1988), Justice Scalia refers to "the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is *none* of his creation." (Emphasis added.) The Court's mandate in *Nollan* and Justice Scalia's concern in *Pennell* was not to limit fees and permit conditions to those few situations where sole causation can be shown, but rather to require the agency to analyze the cause-and-effect connection to ensure that the permit condition is not excessive or unconnected to the burdens created by the project. That is what the City did in this case.

B. The City Received No Contradictory Evidence Regarding the Cause-and-Effect Relationship Between Commercial Development and Demand for Affordable Housing; The Ninth Circuit Properly Affirmed Summary Judgment.

Petitioner manages to avoid mentioning the central reason why the district court granted, and the Ninth Circuit affirmed, summary judgment in this case: the evidence regarding nexus remained undisputed throughout the City's two-year factfinding process.

Commercial developers were represented on the Task Force and petitioner's representatives testified several

times during the ordinance review process. With respect to the nexus study, petitioner and other opponents of the ordinance made only conclusory objections, never providing the City with studies or data to support their claims.[14] Petitioner's counsel promised to provide a written report, together with "back-up studies and data," critiquing the Keyser Marston report. However, petitioner never provided such information. CR 29 at 1959.

The only "evidence" ever provided by petitioner to challenge the City's findings came six months after the ordinance was adopted in the form of a declaration in support of petitioner's motion for summary judgment. Declaration, Pet. at F-1. Like the earlier testimony, however, the declaration consisted of little more than unsubstantiated allegations. Indeed, contrary to the central theme of petitioner's argument, the declaration concedes that commercial development contributes to the demand for affordable housing. It states that "[h]ouseholds decide to relocate on the basis of economic factors *including employment opportunity* and housing cost." Pet. at F-4 (emphasis added). In other words, the Wade declaration made the same point made by Keyser Marston and the Task Force: There are multiple causes for households moving to Sacramento, and one of the key causes is employment opportunity.

Even petitioner recognizes the inherent weakness of its declaration. Petitioner's brief to the Court cites the declaration—its sole piece of analytic evidence—only once, for the irrelevant proposition that "employers follow the work force." Pet. at 14. This claim, however, even if

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[14] Petitioner had ample opportunity to prepare substantive comments. In addition to the Task Force's lengthy deliberative process, a draft of the ordinance was circulated for eight months before final action by the City Council. CR 27 at 1009. Moreover, petitioner's counsel in this Court argued to the Task Force that the Keyser Marston study was inaccurate but never provided any data to support those allegations. CR 26 at 1005.

true is not inconsistent with the evidence that workers come to Sacramento for jobs. Just as firms may come to Sacramento to avail themselves of the Sacramento work force, workers may come to avail themselves of the work opportunities.

The substantial and uncontradicted evidence before the City Council contrasts sharply to the empty nexus record before the Coastal Commission in *Nollan*. The record in this case provided the Ninth Circuit ample authority to affirm the district court's grant of summary judgment.

C. Fundamental Fairness Supports the City's Requirement that Commercial Development Offset at Least Some of the Affordable Housing Program Costs Attributable to That Development; The Ordinance Does Not Single Out Developers to Bear a Public Burden.

The takings clause is founded on concepts of fairness in government regulation. The takings clause ensures that governments act fairly by not imposing undue burdens on certain people when they should be borne by the public as a whole. *See Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 227 (1986). In this case, those same concepts of fairness require that the City's ordinance be upheld. The City's studies have conclusively established that the fee amounts to be paid by commercial developers are *less than half their share* of the housing costs imposed on the City by new commercial development. Equally important, the City's affordable housing program, like adequate transportation facilities and other urban infrastructure, will provide a clear benefit to commercial development by allowing Sacramento to remain an attractive location for new businesses, their employees and their consumers.

The Task Force estimated the total annual cost of the City's affordable housing program to be $42 million. Of this, $11 million was found to be attributable to increased demand created by new commercial development. Pet. at E-19. Yet the ordinance challenged here is ex-

pected to contribute only $3 million to the program with the remainder of the cost to be borne by the public at large—facts not mentioned by petitioner.[15]

Far from being "singled out" for unfair treatment, therefore, commercial developers actually bear less than their share of the City's burden under this ordinance. Although the evidence has established conclusively that commercial development is responsible for far more than the nine percent of the anticipated costs of new low-income demand to be met by trust fund fees, that is the extent of their obligation. The remaining ninety-one percent of the cost is to be paid by the public at large. The City has taken every precaution, with *Nollan* in mind, to avoid placing a disproportionate burden on nonresidential developers.[16]

Despite its calls for "fairness," petitioner argues that the general public should be charged the *full* cost of low-income housing, and commercial builders *none*, even where studies have shown a direct cause-and-effect relationship between the new development and the increased need for such housing. In effect, petitioner wishes taxpayers to subsidize completely the new development, rather than charging fees to cover an amount *less than* the development's fair share of the costs of the housing. There is no merit to this position. The

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[15] The Task Force recommended that the bulk of the program be financed by traditional sources of City funding such as the general fund, community development block grants, and certain redevelopment funds; state and federal grants and loans; and cooperative programs with the private sector to encourage equity investment, conventional loans, and mortgage revenue bonds. 26 CR 898.

[16] By setting the fees well below the "pure nexus" amounts calculated by Keyser Marston, the City exceeded constitutional requirements. This Court held in *United States v. Sperry Corp.*, 493 U.S. 52, 60-61 (1989), that government fees need only be a "fair approximation of the costs of benefits supplied." The Court declined to require that fee levels be "precisely calibrated" or that they "give weight to every factor affecting appropriate compensation." *Id.* (citations omitted).

evidence shows that it is far fairer to the citizens and taxpayers of Sacramento to apply the ordinance than to follow petitioner's argument and require the housing subsidies to be provided entirely by the City's taxpayers, none of whom are, in petitioner's words, more "responsible" for the need for additional low-income housing than is commercial development.

D. Petitioner's Novel Theories Would Undermine Governmental Authority To Impose Widely Accepted Impact Fees.

Petitioner argues that the Ninth Circuit's ruling will open a Pandora's Box of government regulations imposing on developers the costs of solving society's problems. Pet. at 8-9. Sacramento's ordinance is invalid, petitioner claims, because "commercial developers do not cause people to be poor" and thus should be exempt from any regulation which addresses that social problem. Pet. at 15. Petitioner thus asks this Court to find in the takings clause not only the requirement of a cause-and-effect relationship, but also the additional ill-defined requirement that an activity be directly "responsible" for the problem to which the fee is addressed.

Petitioner's argument compounds error upon error. First, petitioner's proposed new "responsibility" standard has no constitutional basis. Petitioner cites no authority for its novel theory which would eliminate the most traditional impact fees—fees which even petitioner appears to concede are constitutional. Petitioner would not question the constitutionality, for example, of an ordinance levying fees in connection with new residential subdivisions to pay for new roads or parks and recreational facilities to serve the subdivision.[17] Pet. at 17, n.12.

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[17] By creating new facilities that contribute to the arrival of new people in the area, a project sponsor can be required to pay a fee to help cover the costs of providing transportation facilities or parks for new people. *Jordan v. Menomonee Falls*, 28 Wis.2d 603, 617-618, 137 N.W.2d 442, 447-449 (1965) (cited with approval in *Nollan*,

Yet, residential structures are not "responsible" for the fact that the residents have cars and use parks and recreation facilities and therefore contribute to the need for additional roads beyond the boundaries of the new development. Moreover, new residential development typically is only one of many factors bringing new residents (and thus new drivers and park users) to the area. Under petitioner's theory, however, these facts would be sufficient to invalidate such an ordinance. Fortunately, neither *Nollan* nor any other case to date requires that a regulated activity by itself, in isolation from other factors, have (1) motivated the arrival of new residents and (2) caused them to possess needs for government services.

Second, by basing its argument on a string of hypothetical ordinances not before the Court, petitioner neglects the facts of the case at hand. The Ninth Circuit decision does not authorize impact fees without a clearly demonstrated cause-and-effect relationship between the impact and the burden. Sacramento's ordinance was anything but the "quick fix" funding mechanism to which petitioner implies agencies will resort as a result of this decision. The evidence was undisputed. The City's two-year review, complete with three dozen public hearings and workshops, experts, and reports clearly demonstrates that compilation of a record that meets the constitutional standard described in this case is a complex and difficult process. A process such as Sacramento followed in this instance does not "circumvent" the democratic process by "compelling wealth transfers . . . with relative invisibility" as alleged by petitioner.[18] Pet. at 12. It is the

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supra, 483 U.S. at 840). The challenged ordinance is no different. It requires commercial developers to pay a fee to cover a small portion of the costs of the low-income housing needed by the people who will work in the new buildings.

[18] The fact that the ordinance may effect a wealth transfer is not relevant to the questions before the Court. This Court recently noted that most land use regulation effects wealth transfers and reaffirmed

embodiment of the proper functioning of the process. It is difficult to conceive of a governmental decisionmaking process that is more detailed or involves a higher level of public review and participation than the decisionmaking that occurred in the case at hand.

Third, petitioner's spectre of commercial developers across the land being forced to single-handedly shoulder the burden of all society's ills ignores the fact that Sacramento's ordinance does not ask that commercial development solve Sacramento's *existing* low-income housing problem. Rather, it requires them to contribute a small amount to address part of a *new* housing problem that they helped to create. By bringing in lower income families, commercial buildings contribute to an increased need for low-income housing in the City, just as they contribute to the need for new roads, sewer systems, water supply, parks, and other government facilities and services. Absent construction of the new commercial buildings, the need for new low-income housing would be substantially less than it would be if the development occurs.

Petitioner's theory also disregards AB 1600 and the California legislature's careful efforts to ensure that local governments respond to the mandate of *Nollan* (discussed *supra*, page 3). Taken together, AB 1600's requirements for explicit findings, segregation of funds, and regular review of fund expenditures, operate to ensure that only those development fees which substantially advance a legitimate government interest will pass muster in California.[19] In not appealing the district court's ruling

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the well-established principle that such transfers do not transform a regulation into a taking. *Yee v. City of Escondido*, No. 90-1947, slip op. at 8 (U.S. April 1, 1992).

[19] As introduced, AB 1600 required local governments to demonstrate only a "rational relationship" consistent with California law at the time. *See*, Assembly Bill 1600, as introduced March 5, 1987. Following this Court's decision in *Nollan*, the state senate amended the bill to require demonstration of a "reasonable relationship." *See*, Assembly Bill 1600, as amended August 18, 1987. Without attempt-

that the City complied with the strict requirements of AB 1600 petitioner argues that the takings clause requires something more—in effect asking this Court to hold that AB 1600 is inadequate to satisfy the mandates of *Nollan*.

Finally, petitioner's theory would undermine all of the work done by planners, economists and government agencies to develop strategies for evaluating social problems and potential regulatory solutions that are consistent with the constitutional requirements described in *Nollan*.[20] Over the past five years since *Nollan* was decided, government officials and their consultants have come a long way in defining methodologies and fact-finding approaches necessary to allocate certain project costs back to the project proponents in a way that is fair. Petitioner's theory would dismantle all of this work with one swift stroke.

If petitioner's theory were to prevail in this case, local governments would be barred from attempting to allocate most new infrastructure and service costs in any sort of proportionate manner. They would likely be forced to limit development to match the reduced pace of necessary infrastructure improvements. The prospect of unconstitutional takings would lie behind every regulation, no matter how carefully an agency did its homework to establish and document a nexus.

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ing to parse the difference, if any, between "reasonable relationship" and "substantially advance," the City believes that this elevation of the standard coupled with the legislation's other provisions requires the rigorous legislative factfinding process described in the Statement of the Case and mandated by *Nollan*.

[20] *See e.g.*, Nicholas, et al., *A Practitioners Guide to Development Impact Fees*, American Planning Association, Planners Press, Ch. 14 (1991); Edward Goetz, *Office-Housing Linkage Fees in San Francisco*, APA Journal, Winter 1990, at 66; Christine Andrew and Dwight Merriam, *Defensible Linkage*, APA Journal, Spring 1988, at 199.

II. THE NINTH CIRCUIT PROPERLY APPLIED A HEIGHTENED DEGREE OF SCRUTINY AS REQUIRED BY *NOLLAN* AND OTHER CASES OF THIS COURT.

Petitioner mischaracterizes the decision below, asserting that the Ninth Circuit mistakenly applied the rational basis test applicable in due process and equal protection challenges. Pet. at 5, 18. A proper analysis of the Ninth Circuit opinion, however, shows that the portion of the opinion cited by petitioner refers to the state of the law pre-*Nollan* rather than to the panel's holding. The court's actual holding was that the evidence showed a "substantial connection between development and the problem to be addressed" sufficient to pass constitutional muster under *Nollan*. Pet. at A-7.

Had the Ninth Circuit applied a traditional rational basis review as petitioner claims, it would have inquired simply whether the City Council could reasonably have concluded that the ordinance would achieve its goal of supplying affordable housing. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). The decision below did not employ such a traditional rational basis review. The Ninth Circuit based its holding on a close analysis of the City's process and the evidence of nexus considered in adopting the ordinance. *See also, Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582-583 (9th Cir. 1991). The decision described the City's extensive study process, the conservative assumptions used in determining the fee levels, and the specific finding by the City Council "that non-residential development is a major factor in attracting new employees to the region and that the influx of new employees creates a need for additional housing in the City." Pet. at A-3. The court particularly noted that the ordinance would raise only nine percent of the total projected annual cost of the City's affordable housing program and that the remainder would be financed from other public sources. *Id.*

The Ninth Circuit found it unnecessary to state precisely the level of scrutiny that *Nollan* requires. Because the strong factual showing in this case would satisfy any level of review, the Ninth Circuit's narrowly drawn decision held only that a few ordinance implemented "only after a detailed study revealed a substantial connection between development and the problem to be addressed," satisfies the requirements of the takings clause. Pet. at A-7.

The Ninth Circuit's approach also was consistent with Justice Scalia's dissent in *Pennell v. San Jose*, *supra*, which noted that land use regulation was permissible under the takings clause wherever

> there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the problem, it cannot be said that he has been singled out unfairly.

485 U.S. 1, 20. Here, the City's legislative factfinding determined that new commercial development increases demands on the City's affordable housing program. The evidence also demonstrated that commercial development benefitted from the City's existing affordable housing and would benefit further from the expanded program to be partially funded by the fee ordinance. CR 29 at 2224.

Thus, the situation at bench bears no resemblance to the facts in *Pennell* that gave rise to Justice Scalia's dissent. The ordinance challenged in *Pennell* would have required that landlords reduce the rent for any hardship tenant residing on their property. 485 U.S. at 4-6. The requirement applied to existing landlords who happened to rent to hardship tenants and was not imposed as a condition on a new land use. Justice Scalia's objection was that the landlord had done nothing to create any impacts addressed by the "hardship tenant" requirement. *Id.*

Sacramento's fee ordinance creates none of these problems. The fee is imposed only when a developer chooses to undertake a voluntary act (apply for a permit to construct a non-residential building) which the City has conclusively demonstrated will increase the burden on the City's affordable housing program. The fee has been tailored to ensure that it addresses only the consequences of the developers' prospective actions and nothing more.

III. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS.

Petitioner's claim that the Ninth Circuit decision conflicts with the decisions of other federal or state courts is disingenuous. This Court's message in *Nollan*—that restrictions on property rights will be upheld only where legislative factfinding has demonstrated that the regulation substantially advances a legitimate government purpose—has been consistently applied by the Ninth Circuit, other federal courts and the states. Neither this case nor any case cited by petitioner suggests any basis or need for this Court to address the questions presented.

A. There is No Conflict Among the Federal Courts.

The few circuits which have applied *Nollan* in concrete disputes have done so in a summary fashion. None has applied a more demanding analysis than the Ninth Circuit in the case at bench and none of the opinions indicates either the existence of a conflict or a need for this Court to intervene. The weakness of petitioner's conflict claim is aptly illustrated by the primary case it relies upon to support the claim, *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991). There is no distinction between the "close analysis" called for in *Azul* and the panel's insistence on a substantial connection between means and ends in this case. The Ninth Circuit affirmed this point in denying, without dissent, petitioner's suggestion for rehearing *in banc* in this case after

Azul was issued.[21] In any event, certiorari is not appropriate to resolve an alleged intra-circuit conflict. *Davis v. United States*, 417 U.S. 333, 340 (1974).

A survey of the other circuits that have considered *Nollan* indicates no conflict among the circuits and in fact little substantive discourse on the matter. In the only other circuit court opinion cited by petitioner, the First Circuit discussed *Nollan* only to note that "analysis under the takings clause may be different from that under the due process clause" and declined to reach the takings claim on ripeness grounds. *Tenoco Oil Co., Inc. v. Department of Consumer Affairs*, 876 F.2d 1013, 1020-21, 1024 (1989). The Second Circuit in *St. Bartholomew's Church v. City of New York* noted *Nollan*'s "substantially advance" language and held without discussion that New York City's landmark preservation ordinance meets that standard. 914 F.2d 348, 357 n.6 (2d Cir. 1990), *cert. denied sub nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector*, 111 S. Ct. 1103 (1991). In *Naegele Outdoor Advertising, Inc. v. City of Durham*, the Fourth Circuit held that Durham's billboard ordinance "advance[d] the legitimate city interest in aesthetics" and distinguished *Nollan* on the basis that the Coastal Commission condition "did not serve a governmental purpose related to the permit" sought by the Nollans.[22] 844 F.2d 172, 178 (1988). The Fifth Circuit too noted *Nollan*'s admonition that land use regulation must "substantially advance [a] legitimate state

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[21] The suggestion for rehearing *in banc* was rejected unanimously by the panel and no judge of the court requested a vote on the suggestion. Order, Jan. 7, 1992 (9th Cir. No. 89-16398) (Pet. at App. C).

[22] In *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169 (1991), *petition for cert. filed*, 60 U.S.L.W. 3453 (U.S. Dec. 5, 1991) (No. 91-941), the Fourth Circuit applied *Nollan* to require a "logical and sufficiently well founded approach" to sustain coastal protection legislation—a standard that, if anything, appears somewhat less protective of property rights than the "substantial connection" found by the Ninth Circuit in this case.

interest" in holding that application of the *Nollan* standard would not change an earlier holding that the National Flood Insurance Program did not constitute a taking.[23] *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir. 1988).

Nothing in any of these cases or the decision below suggests a conflict among the federal courts. Consistent with each of these cases, the Ninth Circuit acknowledged *Nollan*'s emphasis on the "substantially advance" aspect of the traditional takings test as set forth in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Any difference between the Ninth Circuit's approach here and that of other circuits lies not in the substantive standard of review, but in the extent to which it carefully explained the basis for its decision that the City had established a "substantial connection" between the regulated activity and the problem to be addressed. Pet. at A-7, A-2 - A-5. This is not a basis for granting certiorari.

B. There is No Conflict with the Decisions of State Courts.

Nor is there any conflict between the decision below and any state court decisions. Rather, the state court decisions cited by petitioner apply *Nollan* and the requirements of the takings clause in the same manner as the Ninth Circuit, but to facts entirely different from those at bench. *Seawall Associates v. City of New York*, cited by petitioner, applied *Nollan* to invalidate New

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[23] Petitioner also cites two district court opinions. Pet. at 20. In *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 614 (M.D.Fla. 1989), the court, like the district court and Ninth Circuit in this case, reviewed the record before the city, noted the absence of any contradictory evidence and upheld the dune protection ordinance in question. *Boone v. U.S.*, in dicta, indicated without elaboration that *Nollan* would have operated to invalidate a permit condition constituting "a permanent conveyance of continuous public access to the permittee's property" had the court not interpreted the condition more narrowly. 725 F. Supp. 1509, 1523 (D. Hawaii 1989), *modified* 743 F. Supp. 1367 (1990), *aff'd* 944 F.2d 1489 (9th Cir. 1991).

York City's fee of $45,000 per unit for landowners wishing to demolish or convert single-room occupancy properties. 74 N.Y.2d 92, 542 N.E.2d 1059 (N.Y. 1989), *cert. den. sub nom. Wilkerson v. Seawall Associates*, 493 U.S. 976 (1989). In contrast to the case at hand, the record in *Seawall* revealed a complete mismatch between the goals of the regulation and its actual effect. The *Seawall* court found that the ordinance provided "no assurance" that it would provide a housing supply for homeless or low-income families and noted that the City's own nexus study had concluded that the ordinance "would do little to resolve the homeless crisis." *Id.* at 111. *Seawall* thus affirms the analytical approach used in this case, where the Ninth Circuit upheld the ordinance only after reviewing the evidence demonstrating a clear and quantifiable connection between commercial development and the need for affordable housing.

The California court of appeal decision in *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App.3d 1260 (1991), is also consistent with the decision below. *Surfside* employed an analytical approach identical to that of Ninth Circuit. It reviewed the record before the Coastal Commission and overturned certain permit conditions after finding that the conditions were based solely on "general studies which, because of unique or usual [circumstances], may not even apply to the case at hand." *Id.* at 1270. Here, the court's review of the evidence revealed a detailed study of the jobs-housing market in Sacramento. And the ordinance establishes criteria for geographic proximity between the proposed commercial development and affordable housing sites. Ordinance § 33.B.5 (Pet. at D-15). In addition, while the Coastal Commission in *Surfside* had been presented with substantial conflicting evidence, the City's nexus study and related proceedings in this case revealed no evidence contradicting its nexus finding.

Petitioner also refers the Court to the California court of appeal decision in *Blue Jeans Equities West v. City*

and County of San Francisco, 3 Cal.App.4th 164 (1992). That case considered the views of some commentators that any heightened scrutiny requirement under *Nollan* applies only to conditions or exactions diminishing a party's interest in real property (e.g., the lateral access easement in *Nollan*) and not to conditions affecting personal property (e.g., fee payments). *Id.* at 169.

This aspect of *Nollan*'s scope was neither briefed nor relevant in this case. Because AB 1600 effectively makes *Nollan* applicable to all development fees in California, the City has never disputed that *Nollan* establishes the proper standard of review. For the same reason, AB 1600 makes this issue moot throughout California. In *Blue Jeans Equities* the fee requirement was imposed prior to AB 1600's effective date of January 1, 1988. In any event, the result petitioner complains of in *Blue Jeans Equities* provides no basis for granting certiorari in this case and nothing in the Ninth Circuit opinion, district court ruling, or record before the City addresses the issues raised in *Blue Jeans Equities*.

Finally, petitioner makes the baseless claim that this case conflicts with *San Telmo Associates v. Seattle*, 108 Wash.2d 20, 735 P.2d 673 (Wash. 1987). That case did not discuss *Nollan*, the takings clause, the U.S. Constitution, or any decision of this or any other federal court. There, Washington's supreme court applied a state statute to invalidate a fee on low-income housing conversion.[24] As interpreted by the court, the statute in question prohibited any regulation, "the primary purpose of [which] is to accomplish desired public benefits which cost money."[25]

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[24] This fact too distinguishes *San Telmo* and *Seawall* from this case. Whereas the ordinances at issue in those cases effectively served to require the landowner to pay a fee to go out of the single-room occupancy hotel business, the ordinance here applies only prospectively and depends on the use to which the landowner chooses to put his or her land.

[25] A further distinction lies in the fact that this statute may act to prohibit the very type of fees which in California are authorized by AB 1600.

Id. at 24. The case is irrelevant to the decision below which is based entirely on the Court's decisions under the U.S. Constitution.

Far from demonstrating a conflict among the nation's courts, the decision below and cases cited by petitioner instead reveal a consistent application of *Nollan* and the takings clause to differing factual situations. The limited substantive application of *Nollan* in other court decisions fully supports the Ninth Circuit's careful analysis. Each case has held in essence that a local regulation may withstand a takings challenge only where the local government has established a substantial connection between the regulated activity and the aims of the regulation. The facts of this case and the decision below illustrate that the scrutiny demanded by *Nollan* promotes clear legislative factfinding and need not interfere with legitimate responses to the serious problems facing local government today. As applied by the state and federal courts, *Nollan* illustrates to local governments the importance of a well defined process and strong substantiation of the nexus between development impacts and conditions imposed to address those impacts.

CONCLUSION

For the reasons stated herein, the Court should deny Commercial Builders' petition for certiorari.

Respectfully submitted,

SHARON SIEDORF CARDENAS
TED KOBEY, JR.
Office of the City Attorney
City of Sacramento
921 Tenth Street
Seventh Floor
Sacramento, CA 95814
(916) 264-5346

MARC B. MIHALY *
ALLETTA D'A. BELIN
RICHARD S. TAYLOR
SHUTE, MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272
Counsel for Respondents

* *Counsel of Record*

Dated: April 28, 1992

APPENDICES

APPENDICES

APPENDIX A

Assembly Bill No. 1600

CHAPTER 927

An act to add Chapter 5 (commencing with Section 66000) to Division 1 of Title 7 of the Government Code, relating to development projects.

[Approved by Governor September 21, 1987. Filed with Secretary of State September 22, 1987.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1600, Cortese. Development projects: fees.

(1) Existing law imposes various requirements with respect to fees exacted in connection with land development approvals by public agencies.

This bill would, with certain exceptions, require specified local agencies establishing, increasing, or imposing fees (not including taxes or assessments) for specified public improvements, services, or community amenities to be collected from applicants for approval of development projects to make specified findings, segregate the fees in special accounts, reexamine the necessity for the unexpended balance of the fee, as specified, every 5 years, and refund to the then current owner or owners of the development project any unexpended portion of the fee for which need cannot be demonstrated at the time of this review, together with any accrued interest. The bill would permit various methods of refund, and would permit a local agency to utilize moneys otherwise subject to refund for other purposes serving the development project for which the fee was paid if the cost of making the refund exceeds its amount, as determined at a noticed public hearing. The above requirements would impose a state-mandated local program. Local agencies imposing these fees for defined facilities or improvements would be au-

thorized to adopt and annually review a specified capital facilities plan. The bill would become operative January 1, 1989.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $500,000 statewide and other procedures for claims whose statewide costs exceed $500,000.

This bill would declare that there are no costs in this act requiring reimbursement, but would recognize that local agencies and school districts may pursue any available remedies to seek reimbursement for these costs.

The people of the State of California do enact as follows:

SECTION 1. Chapter 5 (commencing with Section 66000) is added to Division 1 of Title 7 of the Government Code, to read:

CHAPTER 5. FEES FOR DEVELOPMENT PROJECTS

66000. As used in this chapter:

(a) "Development project" means any project undertaken for the purpose of development. "Development project" includes a project involving the issuance of a permit for construction or reconstruction, but not a permit to operate.

(b) "Fee" means a monetary exaction, other than a tax or special assessment, which is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project, but does not include fees specified in Section 66477, fees for processing applications for governmental regulatory actions or approvals, or fees col-

lected under development agreements adopted pursuant to Article 2.5 (commencing with Section 65864) of Chapter 4.

(c) "Local agency" means a county, city, whether general law or chartered, city and county, school district, special district, or any other municipal public corporation or district; provided that "local agency" does not include a school district if Senate Bill No. 97 of the 1987-88 Regular Session is enacted and becomes effective on or before January 1, 1988.

(d) "Public facilities" includes public improvements, public services, and community amenities.

66001. (a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency on or after January 1, 1989, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or

portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 53077.

(d) The local agency shall make findings once each fiscal year with respect to any portion of the fee remaining unexpended or uncommitted in its account five or more years after deposit of the fee to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged. The findings required by this subdivision need only be made for moneys in the possession of the local agency and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date.

(e) The local agency shall refund to the then current record owner or owners of the development project or projects on a prorated basis the unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to this subdivision. A local agency may refund the unexpended or uncommitted revenues by direct payment, by providing a temporary suspension of fees, or by any other means consistent with the intent of this section. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

If the administrative costs of refunding unexpended or uncommitted revenues pursuant to this subdivision exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

66002. (a) Any local agency which levies a fee subject to Section 66001 may adopt a capital improvement plan, which shall indicate the approximate location, size, time of availability, and estimates of cost for all facilities or improvements to be financed with the fees.

(b) The capital improvement plan shall be adopted by, and shall be annually updated by, a resolution of the governing body of the local agency adopted at a noticed public hearing. Notice of the hearing shall be given pursuant to Section 65090. In addition, mailed notice shall be given to any city or county which may be significantly affected by the capital improvement plan. This notice shall be given no later than the date the local agency notices the public hearing pursuant to Section 65090. The information in the notice shall be not less than the information contained in the notice of public hearing and shall be given by first-class mail or personal delivery.

(c) "Facility" or "improvement," as used in this section, means any of the following:

(1) Public buildings, including schools and related facilities; provided that school facilities shall not be included if Senate Bill 97 of the 1987-88 Regular Session is enacted and becomes effective on or before January 1, 1988.

(2) Facilities for the storage, treatment, and distribution of nonagricultural water.

(3) Facilities for the collection, treatment, reclamation, and disposal of sewage.

(4) Facilities for the collection and disposal of storm waters and for flood control purposes.

(5) Facilities for the generation of electricity and the distribution of gas and electricity.

(6) Transportation and transit facilities, including but not limited to streets and supporting improvements, roads, overpasses, bridges, harbors, ports, airports, and related facilities.

(7) Parks and recreation facilities.

(8) Any other capital project identified in the capital facilities plan adopted pursuant to Section 66002.

66003. This chapter does not apply to a fee imposed pursuant to a reimbursement agreement by and between a city or county and a property owner or developer for that portion of the cost of a public facility paid by the property owner or developer which exceeds the need for the public facility attributable to and reasonably related to the development. This chapter shall become operative on January 1, 1989.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution, because this act does not mandate a new program or higher level of service on local government. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 4 (commencing with Section 17550) of Part 7 of Division 2 of Title 2 of the Government Code.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. CIV 89-638 EJG

COMMERICAL BUILDERS OF NORTHERN CALIFORNIA, and
ITS AFFECTED MEMBERS,
Plaintiffs and Petitioners,

v.

CITY OF SACRAMENTO, COUNCIL OF THE
CITY OF SACRAMENTO, and DOES 1-20, inclusive,
Defendants and Respondents.

Date: September 8, 1989
Time: 1:45 p.m.
Dept: Courtroom No. 2

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DECLARATION OF SERVICE BY MAIL

Re: Case No. CIV 89-638 EJG

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, State of California, and not a party to the above-entitled cause. On July 19, 1989, I served a true copy of the within

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by guaranteed overnight delivery service, by placing a true copy thereof in a pre-paid, sealed Federal Express envelope and causing it to be handed to an authorized agent with instructions for next day delivery to the party at the address listed below.

Christina J. Savage
Joel S. Levy
HEFNER, STARK & MAROIS
2710 Gateway Oaks Drive
Suite 300 South
Sacramento, CA 95833

I do hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 19, 1989, at San Francisco, California.

/s/ Janet Paine
JANET PAINE

Supreme Court, U.S.
FILED
APR 24 1992
OFFICE OF THE CLERK

No. 91-1556

In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND ITS TWO MEMBERS, THE BUILDING INDUSTRY ASSOCIATION OF THE DELTA AND CENTRAL VALLEY IN SUPPORT OF PETITIONER

STEVEN A. HERUM
Counsel of Record
California Building Industry Association, Building Industry Association of the Delta and Central Valley
509 W. Weber Avenue, Fifth Floor
Post Office Box 20
Stockton, California 95201-3020
(209) 948-8200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 91-1556

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I. INTEREST OF AMICUS CURIAE[1]

The California Building Industry Association is a federation of ten regional and local associations representing

[1] Counsel of record have consented to the filing of this amicus brief and those letters have been filed with the Clerk pursuant to Supreme Court Rule 37.

6,000 members engaged in commercial and light industrial construction and the building of most of California's residential housing. The Building Industry Association of the Delta and the Building Industry Association of the Central Valley are two of the representative local associations. The interest of the amici is in seeing that governmental burdens upon the construction industry and its projects are fairly imposed, clearly attributable to its activities and predictable.

As federal and state funding for city and county government has become increasingly scarce, local agencies are searching for new methods to increase their revenue. A very popular target has unfortunately been fees on construction projects. Of course, under the U.S. Supreme Court case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court required that a "nexus" must exist between the development project and the condition imposed. Absent this nexus, the condition is invalid and constitutes a taking in violation of the Fifth Amendment to the United States Constitution.

The case of *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), directly calls into question this Court's decision in *Nollan* and seeks to determine how direct and substantial the nexus must be in order to impose conditions on a project.

Practitioners throughout the nation face this critical question on a weekly and even daily basis. Questions concerning the nexus requirement of *Nollan* are repeatedly raised in hearings and meetings before local city and county planning commissions and city councils, and it is

our experience that the case at bar has created confusion and chaos with respect to the takings question.

Because of the divergent decisions, attorneys for applicants, the opposition, and local agency attorneys spend countless hours arguing over the question of whether an ordinance or resolution or permit condition constitutes a taking. It is not at all unusual for such arguments to occur at two in the morning, after hours of public testimony on the issue.

Thus, from a purely practical standpoint, this Court is respectfully and indeed, strongly urged to grant this request for writ of certiorari so that those who face this issue on a repeated and continual basis will have clear and definitive guidance from this Court on this critical issue.

II. SUMMARY OF ARGUMENT

As a practical matter, attorneys representing applicants or opponents who regularly appear at planning commission meetings and city council meetings constantly face the *Nollan* question. The mischief caused by uncertain rules inevitably lead to uneven and inconsistent treatment of real property rights on a jurisdiction by jurisdiction or case by case basis.

This Court would not tolerate such uncertainty in matters of political or religious freedom. This Court stated in footnote 2 of the majority opinion in *Nollan* that "the right to build on one's own property – even though its exercise can be subjected to legitimate permitting

requirements – cannot remotely be described as a 'governmental benefit'." Thus, this Court has impliedly recognized that the right to build and develop one's own property is a right, not just a privilege. (*Cf. Trent Meredith, Inc. v. City of Oxnard*, (1981) 114 Cal. App. 3d 317, 328, 170 Cal. Rptr. 685.) If property rights stand on equal footing with other constitutionally protected rights, this Court should not tolerate such uncertainty in the important area of property rights.

The result of inconsistent interpretations of the *Nollan* decision is a cloud of uncertainty which frustrates attempts to determine what is or is not a taking under *Nollan*. It is therefore imperative that this Court grant the writ of certiorari in this case to provide clear guidelines to the lower courts and local agencies so that certainty and consistency can once again be restored in this important area of property rights.

III. ARGUMENT

A. The *Nollan* Question Occurs On A Weekly Basis

Attorneys who represent clients appear on a weekly basis at a variety of local government meetings, including city and county planning commission meetings, city council meetings and board of supervisors meetings. One of the most frequent questions faced by both local government attorneys and applicant's attorneys is whether a local government regulation constitutes a taking under *Nollan*.

It is not at all unusual for such arguments to be made at two in the morning, as such meetings begin early in the evening and often run late into the night. And it is not unusual for such discussions to become a heated debate, because case law at the present time lends itself to inconsistent interpretations.

Such debates are neither necessary nor productive. As this situation will continue to occur for the foreseeable future until this Court gives clear guidance on the takings question raised by *Nollan*, and since this question is faced on a continuous basis by practitioners in the field, a resolution of this important question is clearly warranted.

B. The Lower Courts Have Rendered Inconsistent Decisions Under *Nollan*

This Court made clear in *Nollan* that the takings test to be applied to permit conditions is whether the exaction substantially advances legitimate state interests. This Court carefully distinguished this test from the rational basis standard applicable in due process and equal protection cases. *Nollan*, 483 U.S. at 834, n.3. The Court pointed out that in the exaction context there is a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* at 841.

The California District Court of Appeal in *Surfside Colony, Ltd. v. California Coastal Commission*, (1991) 226 Cal. App. 3d 1260, 1270, interpreted *Nollan's* takings test as involving a heightened level of scrutiny distinct from the rational basis standard and extreme deference previously applied by California courts to permit conditions.

The California court explained that *Nollan* "changed the standard of constitutional review in takings cases. Whether the new standard be described as a 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." *Id.*

In direct conflict with *Surfside Colony,* the Ninth Circuit in the present case applied a rational basis standard and stated: "We are not persuaded that *Nollan* materially changes the level of scrutiny we must apply." *Commercial Builders,* 941 F.2d at 847; Petitioner's Appendix at A-6.

More recently, the conflict regarding the *Nollan* standard has been made even more confusing. In *Blue Jeans Equities West v. City and County of San Francisco,* (1992) 3 Cal. App. 4th 164, another California District Court of Appeal was faced with the task of reconciling the inconsistent decisions in *Surfside Colony* and the case at bar. The unprecedented approach taken in *Blue Jean Equities* was to decide that *Nollan's* heightened scrutiny test applied to possessory taking claims but not to regulatory taking claims. *Blue Jean Equities,* 3 Cal. App. 4th at 171. To reach this conclusion, the California court relied upon the decision by the Ninth Circuit in the case at bar. *Id.*

These conflicting interpretations are not only contrary to the plain language of *Nollan,* but are resulting in substantial confusion for practicing attorneys and government agencies. The difficulties presented in attempting to apply *Nollan's* test when it has been interpreted in such different ways by lower courts is a major problem which should be corrected by this Court.

IV. CONCLUSION

The decision in *Commercial Builders* is clearly contrary to *Nollan* and has produced widely divergent interpretations among California courts. As a result, if allowed to stand, the precedent in this case will continue to cause uncertainty in land use decisions on a repeated and ongoing basis. Accordingly, this Court is respectfully requested to grant certiorari so that local agencies and practicing attorneys representing property owners before those agencies are provided clear guidance and direction with respect to this important question in takings jurisprudence.

Respectfully submitted,

STEVEN A. HERUM
Counsel of Record
California Building Industry Association, Building Industry Association of the Delta and Central Valley
509 W. Weber Avenue, Fifth Floor
Post Office Box 20
Stockton, California 95201-3020
(209) 948-8200

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION LEGAL CENTER IN SUPPORT OF PETITIONER, COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA

*David B. Smith
*Counsel of Record
Oregonians In Action
Legal Center
8255 S.W. Hunziker
Suite 200
P.O. Box 230637
Tigard, Oregon 97223
Telephone: (503) 620-0258

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 91-1556

In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION LEGAL CENTER IN SUPPORT OF PETITIONER, COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA

This motion of Oregonians In Action Legal Center for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the Clerk of this Court. Consent has been granted by counsel for the City of Sacramento and the Council of the City of

Sacramento; this consent has been lodged with the Clerk of this Court.

Oregonians In Action Legal Center is a statewide, nonpartisan, nonprofit Oregon corporation deeply involved in test case litigation seeking protection for the constitutional rights of landowners, thereby countering excessive land use regulation. It is financed entirely through voluntary contribution of time and money from individuals, families, businesses, and foundations on a continuing basis.

Oregonians In Action Legal Center is motivated by the firm belief that private landowners should not bear burdens that in all fairness and justice should be borne by the public, a concept reiterated by Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987). Oregonians In Action Legal Center is also motivated by a strong belief that reasonable protection for private property is essential to maintain the resource allocation and efficiency functions of our market system. Moreover, Oregonians In Action Legal Center agrees with Justice Stewart that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In this proceeding, Oregonians In Action Legal Center seeks to augment the arguments in the petition for certiorari by highlighting 1) the adverse impacts on landowners in Oregon which have arisen from the decision of the Court of Appeals for the 9th Circuit, and 2) the need

to clarify and strengthen constitutional protection for private property. Oregonians In Action Legal Center believes the decision of the 9th Circuit is incorrect and poses a serious threat to property rights.

For the foregoing reasons, Oregonians In Action Legal Center requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: April 24, 1992

Respectfully submitted,

*David B. Smith
*Counsel of Record
Oregonians In Action
Legal Center
8255 S.W. Hunziker, Suite 200
P.O. Box 230637
Tigard, Oregon 97223
Telephone: (503) 620-0258

By _____

Attorney for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Oregonians In Action Legal Center.

STATEMENT OF THE CASE

Oregonians In Action Legal Center adopts the Statement of the Case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Oregonians In Action Legal Center is deeply concerned over judicial decisions with precedential value in Oregon that fail to properly construe Justice Scalia's majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In view of Oregon's oppressive land use regulatory system, adopted in 1973, private property rights in the state have been, and will continue to be, trampled under foot by regulators unless it is clearly established that the Takings Clause of the Fifth Amendment requires a precise fit between the burdens generated by development and the exactions on development imposed by government. The decision of the Court of Appeals for the Ninth Circuit misconstrues both the nexus required by Justice Scalia, and the variables between which that nexus must be established.

In *Commercial Builders*, Judge Schroeder first concluded that the decision of the City of Sacramento was not unconstitutional because "The burden assessed against the developers . . . bears a *rational relationship* to a public cost closely associated with such development." *Commercial Builders v. Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (emphasis added). She then went on to hold:

> *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it

> can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the *problem that the exaction seeks to address*, the exaction cannot be upheld. *Id.* at 875 (emphasis added).

In essence, Judge Schroeder held there must only be a rational relationship between the exaction imposed on a development and the government interest sought to be advanced by the exaction. Such a construction is contrary to this Court's opinion in *Nollan*.

The *Nollan* majority's holding on the nexus requirement was clearly delineated by Justice Scalia, responding to the dissent of Justice Brennan:

> Even if the [California Coastal] Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," *post* at 862, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a

> condition to the lifting of a land use restriction * * * . *Nollan*, 483 U.S. at 840-841 (emphasis in original).

Notwithstanding the fact that the California Coastal Commission's determination did not meet even a rational relationship test, *Id.* at 838, this Court made it apparent in *Nollan* that a heightened level of scrutiny must be applied in determining the constitutionality of development exactions. The Court of Appeals for the Ninth Circuit disregarded this principle.

This Court also held that the exaction had to be related to the public need or burden that a proposed development creates or to which it contributes. *Id.* at 838. This was aptly illustrated by Justice Brennan's dissent: "The Court's insistence on a *precise fit between the forms of burden and condition on each individual parcel* along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate." *Id.* at 847 (emphasis added). He later characterized the *Nollan* court's opinion as an "[U]nusual demand for a precise match between the condition imposed *and the specific type of burden on access created by the appellants.*" *Id.* at 849 (emphasis added). The Ninth Circuit's opinion also disregarded this principle.

This Court's rules for when a development exaction will pass constitutional muster have been misinterpreted, and the improper holdings of *Commercial Builders* given deference, in Oregon. The Oregon Supreme Court misconstrued this Court's *Nollan* opinion in *Department of Trans. v. Lundberg*, 312 Or. 568, ___ P.2d ___ (1992). The case dealt with the constitutionality of a sidewalk dedication ordinance imposed by the city on the owners of

commercial property. After citing to *Nollan*, and following a lengthy discussion of the city's dedication ordinance, the Oregon Supreme Court concluded "The requirement of sidewalk dedication *reasonably relates* to commercial development by providing pedestrian access and mitigates the negative impact of any proposed commercial use by buffering both the pedestrian and commercial use from the vehicle use." *Id.* at 577-578 (emphasis added). Even though the court went on, based on the facts of the case, to conclude "The ordinance substantially furthers these purposes," *Id.* at 578, the court's holding on the nexus required was "reasonably related." That construction is contrary to this Court's nexus standard in *Nollan*.

A recent decision by the Oregon Land Use Board of Appeals (LUBA) also adopted an improper construction of the *Nollan* holding. The Land Use Board of Appeals is an Oregon hearings body created to hear and decide appeals of quasi-judicial and legislative land use decisions of local governments. Its decisions are appealable to the Oregon Court of Appeals. In *Dolan v. City of Tigard*, ___ Or. LUBA ___ (LUBA No. 91-161, February 7, 1992), the Land Use Board of Appeals ruled on a case concerning the constitutionality of exactions to dedicate property for a greenway and pedestrian and bicycle pathways as conditions of redevelopment approval of commercial real estate.

That board held:

> *Nollan* does not establish a new, stricter standard for the relationship required between the impacts or burdens of a proposed development and exactions imposed as conditions of development approval.

> Thus, we agree with respondent [city] that the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking if it has a "reasonable relationship" to the impacts of or needs generated by the proposed development. *Id.*, slip op. at 14.

Furthermore, the board's opinion relied directly on the opinion of the Court of Appeals for the Ninth Circuit in *Commercial Builders:* "We, therefore, agree with . . . the Ninth Circuit Court of Appeals' statement in *Commercial Builders v. Sacramento, supra,* that *Nollan* does not establish a new, stricter standard for the relationship required between the impacts or burdens of a proposed development and exactions imposed as conditions of development approval." *Id.*, slip op. at 13. This reliance on *Commercial Builders* and misconstruction of the nexus required by this Court in *Nollan,* resulted in the Land Use Board of Appeals holding that the city did not take an unconstitutional exaction in the petitioners' property solely because the city had established a reasonable relationship between the dedication exactions and the impact of the petitioners' proposed redevelopment of their commercial real estate.

In view of the constructions of the nexus requirement in Oregon, it is of great importance to the citizens of this state that this Court grant the Petition for Certiorari, and establish uniformly that a precise fit is constitutionally required between an exaction, and the burdens or impacts of proposed development, in order to meet the Court's nexus standard.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit holding the City of Sacramento's ordinance did not take an unconstitutional exaction should be reversed by this Court. As Judge Beezer of the Ninth Circuit said, writing in dissent of the opinion of the majority in *Commercial Builders*, "Sacramento would have developers pay not just for public improvements necessitated by development, but for private subsidies with little or no causal connection to development." *Commercial Builders*, 941 F.2d at 877 (Beezer, J. dissenting). As long as the *Commercial Builders* opinion stands, the federal district courts in the states of the Ninth Circuit, in general, and the state courts and hearings boards of Oregon, in particular, will continue to allow local governments unfairly to impose exactions on developments to secure public benefits that should be underwritten instead by taxpayers. The decision, if not reversed, will become a precedent that could have widespread adverse impacts on property rights not only throughout the state of Oregon but also throughout the entire western United States.

DATED: April, 1992.

Respectfully submitted,

*David B. Smith
*Counsel of Record
Oregonians In Action
Legal Center
8255 S.W. Hunziker St.
Suite 200
Tigard, Oregon 97223
Telephone: (503) 620-0258

Attorney for Amicus Curiae

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BRIEF AMICUS CURIAE OF THE VALLEY INDUSTRY AND COMMERCE ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REZNIK & REZNIK,
A Law Corporation
BENJAMIN M. REZNIK
FRED N. GAINES
(Counsel of Record)
JOHN M. BOWMAN
15456 Ventura Boulevard
Fifth Floor
Sherman Oaks, California 91403
(818) 907-9898; (213) 872-2900
FAX (818) 907-8465

Attorneys for Amicus Curiae Valley Industry and Commerce Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

This brief amicus curiae of the Valley Industry and Commerce Association in support of the Petition for Writ of Certiorari sought by Petitioners in this case is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for all parties.

INTEREST OF AMICUS CURIAE

The Valley Industry and Commerce Association ("VICA") is a non-profit public benefit corporation established to advance and promote a positive socio-economic and a balanced physical environment in the northern portion of Los Angeles and Ventura Counties. VICA's over 300 members include many of the country's leading corporations in fields ranging from health care to aerospace, manufacturing to finance, and employ more than 90,000 people in the Greater San Fernando Valley and its surrounding communities. Since 1949, VICA has served to articulate business' agenda to elected officials and the public in an effort to retain and attract jobs, and to encourage the economic vitality of the region.

It is the goal of VICA to enhance its constituent areas' attractiveness as both a dynamic industrial and commercial region as well as a desirable place to work and live. VICA, through its Board of Directors, and specifically its Land Use Committee, is actively involved in general policy issues affecting land use planning, and associated development regulations, including exactions and development fees.

As amicus curiae, VICA seeks to augment the argument in the Petition for Writ of Certiorari. VICA believes that its public policy perspective and collective experience in support of private property rights and their relationship to a healthy economic environment will provide an additional viewpoint with respect to the constitutional issues presented. The City of Los Angeles, as well as many other southern California municipalities and local agencies, have adopted, or are considering the adoption of, development linkage fees similar to those at issue in this case. As a result, VICA believes it is in the best interest of all affect parties to have clear direction

from this Honorable Court as to the appropriateness and legality of these types of exactions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

It is important for the Court to be aware that the matters at issue in this case affect not only developers and property owners, but the entire business community. VICA's primary purpose in filing this brief is to provide the Court with some perspective as to how the "nexus" requirement for development exactions, as established in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), has been grossly abused by state and local governments, and misinterpreted by the court below, with a resulting negative impact on commerce.

As traditional sources of revenue have dried up, local governments have increasingly turned to fees on new construction as a means of closing the budgetary gap. However, the proliferation of development or "linkage" fees, which shifts the tax burden from the general population to the construction and development industry, has had a chilling effect on the entire economy of our region. A recent study, commissioned by VICA and conducted under the auspices of the UCLA Graduate School of Management, confirmed that new regulations on development, including specifically escalating requirements for development fees and other exactions, are a primary reason that companies in this region have postponed or canceled plans for further growth and expansion.[1]

Based on the broad "nexus" analysis condoned by the court below, the development of real property can be theoretically linked to the need for almost any program of state or local government, and virtually any development fee can be justified through an elaborate "cause and effect" analysis. Too often, however, this "analysis" represents nothing more than a

---

[1] *See* Valley Industry and Commerce Association, "Business Study of the San Fernando Valley," UCLA Anderson Graduate School of Management, May 7, 1991.

post-hoc rationalization. In a nutshell, the argument is as follows: people need services, commerce allegedly creates those needs, and property developers (generally viewed as a politically unpopular group) pay the bill; the whole scenario constitutionally blessed under the guise of the *Nollan* "nexus" test.

For example, the City of Los Angeles has prepared a "nexus" study and will soon adopt a low-income housing linkage fee, similar to the one at issue in this case, but with the fee at a level *five to ten times greater* than that charged in Sacramento. Los Angeles already has an "Art Development Fee"[2] which requires a payment of one percent of all commercial construction costs to the City for art and cultural programs.

The decision below opens a Pandora's Box of possibilities for further abuse of the *Nollan* "nexus" requirement. In many large urban areas, including Los Angeles, residents of lower income neighborhoods often do not have the same access to supermarkets, shopping centers and entertainment establishments (e.g. movie theaters) as do residents of other areas of the City, and it has been suggested by some that the government should require developers in downtown areas or more affluent neighborhoods to pay for (or build and operate) supermarkets in low income areas. Obviously, such a requirement would be far adrift from the dictates of this Court in *Nollan*. Yet, the Ninth Circuit clearly leads us in this exact direction.

The already typical scenario is as follows. An existing but unfunded need is identified. A study is then commissioned by the local government to establish the required "nexus."[3]

---

[2] City of Los Angeles Ordinance No. 166,724

[3] Interestingly, an unintended side effect of *Nollan* has been to spawn a cottage industry of consultants to produce the justifying "nexus" studies. As in Sacramento, virtually every linkage fee involves the hiring by the local government of outside consultants, charging tens to hundreds of thousands of dollars, to conduct the required "nexus" analysis. Not surprisingly, we are unaware of any locality every having paid for such a study only to have the study result in a finding that no "nexus" existed.

With "nexus" study in hand, the locality feels free to adopt a fee on development. The only thing left is for the government to set the amount of the fee, which is largely a political decision. Often the fee is set at an amount high enough to serve its purposes but low enough to make a legal challenge by the affected parties uneconomical. The entire process is rife with abuse, and too often the government crosses over that thin line between a legal exaction and an "out-and-out extortion." *See Nollan,* 483 U.S. at 837.

Among the clearest examples of abuse of the *Nollan* requirements comes from the findings used by the City of Culver City, California, to establish an alleged "nexus" for its "Arts in Public Places" development fee. Those findings state, in part:

> (c) As development and revitalization of real property within the City continues, the opportunity for creation of cultural and artistic resources is diminished.
>
> (d) As this development and revitalization continues as a result of market forces, urbanization of the community results.
>
> (e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased.
>
> (f) Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization.[4]

To say that such findings fall short of the constitutional "nexus" requirement would be an understatement. Yet that is how one city justifies charging all development a one percent fee for public art projects. Without further direction from this Court, this result will likely be duplicated by states and local governments across the country.

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[4] *See* City of Culver City Ordinance No. 88-019.

CONCLUSION

This case provides a timely and important opportunity for this Court to further delineate the constitutional requirements of the "nexus" test set forth in *Nollan*. To allow the decision below to stand would condone the practice of allowing meaningless and pretextual "nexus" studies to replace important constitutional protections. Until business and government play by the same set of constitutional rules, the ability of our economy to grow and compete will continue to be seriously hampered. VICA respectfully requests that this Court grant a Writ of Certiorari in this case.

DATED: April 27, 1992

REZNIK & REZNIK,
A Law Corporation
BENJAMIN M. REZNIK
FRED N. GAINES
(Counsel of Record)
JOHN M. BOWMAN
15456 Ventura Boulevard
Fifth Floor
Sherman Oaks, California 91403
(818) 907-9898; (213) 872-2900
FAX (818) 907-8465

Attorneys for Amicus Curiae
Valley Industry and Commerce
Association

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CALIFORNIA BUSINESS PROPERTIES ASSOCIATION BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Jo Anne M. Bernhard
Law Offices of Jo Anne M. Bernhard
2621 "K" Street
Sacramento, California 95816
Phone: (916) 442-4908
Fax: (916) 442-1624

Attorney for Amicus Curiae California Business Properties Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CALIFORNIA BUSINESS PROPERTIES ASSOCIATION AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

California Business Properties Association (CBPA) is a non-profit association composed of developers, builders, lenders, commercial property owners, real estate agents, major retailers and professional service corporations engaged in creating, constructing and operating shopping and industrial centers, commercial developments and redevelopment projects.

CBPA is the designated legislative advocate in the State of California for the International Council of Shopping Centers (ICSC), the California chapters of the National Association of Industrial and Office Parks (NAIOP), the Commercial Industrial Development Association (CIDA), the Associated Builders and Contractors (ABC), the Industrial League of Orange County (ILOC) and the San Diego Commercial Industrial Council (SDCIC).

These affiliations make CBPA the acknowledged voice of the commercial real estate industry in California, representing the state's largest commercial real estate consortium with almost 7,000 members whose projects are valued in the billions.

This case represents the imposition of a burdensome governmental regulation that severely diminishes, restrains and restricts its members' private property rights. The final outcome is extremely important to this *amicus curiae* and all of its member trade organizations who confront countless regulatory requirements affecting the use of their property across the State of California each day. Many of these requirements are unrelated and unreasonable.

FACTS

CBPA refers the Court to the Brief of the Petitioners for a statement of the facts of this case, and that statement is incorporated herein by reference.

ARGUMENT

POINT I

The conflict created by the Court below should be resolved.

The Court's decision below has caused the adoption of a standard contrary to the one approved by this Court in the *Nollan Case*.[1] Until the conflict is resolved, many real estate projects cannot be adequately planned; unforeseen, unexpected and unrelated fees can be imposed by any governmental body anytime it requires a solution to the "societal problem of the day". A developer or builder will never know what to expect or what cause its project is going to be required to support or resolve on a given day.

Resolution is especially important to those members who are restricted and restrained from otherwise developing their commercial property unless they agree to the imposition of numerous and enormous fees and exactions in the guise of costs that purport to substantially relate to and result from their proposed developments, when, in reality, there is little, if any causal connection.

As such, these unexpected fees will result in a substantial interference with any proposed development of an individual's real property unless the conflict in the standard for imposition is resolved.

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[1] Nollan vs. California Coastal Commission, 483 U.S. 834 (1987)

POINT II

The oppressive imposition and exaction of private property fees by government creates a loss of reasonable economic use of one's property without just compensation.

Developers of commercial real property projects have created valuable assets for the community and will continue to do so if not impaired by oppressive governmental regulations. These assets provide jobs and income to a community that is already in place. If future development is required to cure existing social ills, such as lack of that community's affordable housing (as in this case), then eventually all such development will be assessed with a multitude of "societal solution" problems. These can range from additional police protection to more playgrounds, child care centers, medical facilities, aids research centers, immigration needs, and on and on. One oppressive regulation creates the catalyst and should be deemed to be the first taking that requires fair and just compensation.[2] If not, then how many more such regulations will be required to constitute such a taking.

If a proposed project is unable to be developed due to oppressive regulatory demands and requirements whether monetary or not, and if that practice is not deemed to be a "taking without just compensation", then eventually, as the land sits for months and years, the lack of income may cause the owner to be unable to pay the upkeep of the property, including the taxes. Then such

---

[2] United States Constitution, Fifth Amendment, which provides, in part: "[N]or shall private property be taken for public use, without just compensation"

property will eventually escheat to the government. A taking ultimately occurs, but, in this case, for no compensation.

The fact that the City of Sacramento has continued to suffer a loss in income due to the voter imposed change in California's property tax assessment structure over 15 years ago[3] and that it seeks to replace that loss with imposition after imposition should not excuse its responsibility of paying a fair and just compensation, when such imposition results in the economic loss of the property to its owner.

CONCLUSION

For these reasons, the petition for writ of certiorari raises substantial questions of federal law and this *amicus curiae* respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

Jo Anne M. Bernhard
Law Offices of Jo Anne M. Bernhard
2621 "K" Street
Sacramento, California 95816
(916) 442-4908

Counsel for Amicus Curiae

[3] California Constitution Article 13(a)

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PETITIONER'S REPLY BRIEF

RONALD A. ZUMBRUN
EDWARD J. CONNOR, Jr.
*JOHN M. GROEN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The argument made by the City of Sacramento (City) shows quite vividly why this Court should review the question of whether, *as a matter of law*, there was a sufficient nexus shown between commercial development and low-income housing needs to meet the requirements imposed by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

The City goes to great lengths to argue *its interpretation* of what its study said. Words interpreting the Keyser Marston Report (Appendix to the petition (App.), App. E),

are added to that study in a blatant effort to neutralize the study's statement that it does not " 'make the case that building construction is responsible for growth.' " Brief in Opposition at 12. The City then disregards evidence contrary to its interpretation in the declaration of David Wade. App. F.

Of course, the City carefully avoids the fact that this case was concluded below in the City's favor on *a motion for summary judgment*. Accordingly, there was never an opportunity for an evidentiary trial testing the meaning, intent, or adequacy of the study. Yet the study's barebones conclusion that commercial development is "related" to an increase in the need for low-income housing was all that was considered necessary by the Ninth Circuit. App. A-10. And, as the City readily acknowledges, that relationship, *i.e.*, "the link between new jobs and new commercial space," is shown by a finding that "new jobs could not be created absent commercial development to house those jobs." Brief in Opposition at 5-6.

Is this all that is required? To the contrary, this Court has said over and over again that there is no set formula for determining when a regulatory taking has occurred, but that each case must be examined, *ad hoc*, on its own facts for the purpose of determining whether a regulatory scheme goes so far as to result in a taking. *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). As this Court again recently stressed in *Yee v. City of Escondido*, No. 90-1947 (Apr. 1, 1992), regulatory takings analysis "necessarily entails complex factual assessments." Slip op. at 1. The Court emphasized that local laws regulating the use of land must be "analyzed by engaging in the 'essentially ad hoc, factual inquiries'

necessary to determine whether a regulatory taking has occurred." *Id.* at 7-8.

The City's Brief in Opposition thus necessarily struggles mightily to uphold the Ninth Circuit's decision that an adequate nexus was shown by the Keyser Marston study as a matter of law and without the benefit of a trial.

THE KEYSER MARSTON STUDY DID NOT ESTABLISH A CAUSE AND EFFECT RELATIONSHIP WHICH WOULD SHOW, AS A MATTER OF LAW, THE EXISTENCE OF A SUFFICIENT NEXUS AS REQUIRED BY NOLLAN

The City argues that the Keyser Marston study shows "that new job creation is the *primary cause* of population growth in Sacramento and that this growth is accompanied by growth in the number of low-income households." Brief in Opposition at 5 (emphasis added). Although this disregards the Wade affidavit, as well as the need for a factual trial to test any such conclusion, the Keyser Marston study actually shows no such thing.

Keyser Marston said:

> The nexus analysis illustrates how the typical cross section of employees in a commercial or industrial building will likely include a certain number of employees from very low income households. The nexus analysis does not make the case that building construction is responsible for growth. Clearly many factors come into play in determining what makes a region grow.

App. E-9. The study then concluded:

> At best, it can be said that the production of buildings to accommodate growth is but one of

> many factors that *enable or contribute* to its occurrence.

App. E-9, 10 (emphasis added).

In other words, and as acknowledged by the City, the study's premise is that new employees cannot be attracted to new businesses absent construction to house those businesses.

One is reminded of the conceptual problems addressed by law students analyzing "cause and effect" relationships in first-year tort studies. When the City concludes that there is an adequate nexus because "new jobs could not be created absent commercial development to house those jobs" (Brief in Opposition at 5-6), one can only contemplate the myriad of other things which, in a similar sense, could prevent new jobs from being created if these things did not take place. It frequently can be said that a given occurrence would not result "but for" a whole series of events leading up to it.

For example, Keyser Marston's reasoning would likewise lead to a conclusion that a person who is injured, after going to town to make a purchase, is responsible for his own injury because it would not have happened if he had not gone to town. And if that person took a bus to town, they would similarly conclude that the bus company is responsible for the injury because the person would not have gone to town were it not for the bus. And if the person were going to town to buy a Brand X hat, they would find the Brand X manufacturer to be the cause of the injury for the reason that, absent the hat, the person would have had no occasion to go to town and be injured.

Of course, there is more to "cause and effect" than this. Such reasoning totally violates the concepts

expressed by this Court in *Nollan*. Yet this is what the Ninth Circuit accepted.

This Court, in *Nollan*, sent a strong signal that restrictions placed on the use of real property, imposed unless owners are willing to concede something away, should be closely examined. They must be carefully examined to ensure that property owners, desiring to make otherwise reasonable use of their properties, are not being treated as convenient targets of opportunity to obtain private resources for public purposes. This Court in *Nollan* once again stressed the principles of "fairness and justice" which underlie the Fifth Amendment's Takings Clause. *Nollan*, 483 U.S. at 835 n.4. And the Court has just reemphasized these concepts in *Yee v. City of Escondido* stating that the issue in a regulatory takings context is whether an "ordinance unjustly imposes a burden" that should be met by the public rather than " 'disproportionately concentrated on a few persons.' " Slip op. at 9-10.

The Court in *Nollan* also said that exaction justifications require "more than an exercise in cleverness and imagination." 483 U.S. at 841. In making this point, the Court said that it viewed "the Fifth Amendment's Property Clause to be more than a pleading requirement . . . . " *Id.*

It may, of course, be true that if no one builds the structures necessary to house new businesses, or if no one does the many myriad of things needed to enhance a community's economic development, some people, including some poor people, will not move into the community. But if this is all that is required to provide a causal connection, then Judge Beezer's warning in dissent is a reality and those who help provide needed jobs can indeed be asked "to subsidize small business retailers,

child-care programs, food services and health-care delivery systems." App. A-14 (Beezer, J., dissenting). The question presented is whether investors in a community can be asked to assume responsibility for the social problems of the community merely because they are willing to invest in the community and thereby enhance its job capability base.

The true answer, of course, is that the social problem addressed by low-income housing is not the responsibility of those who provide jobs for poor people or whose actions are a factor leading to the creation of such jobs. The social problem addressed relates to the *lack of jobs* as well as to a whole host of other factors that prevent people from achieving income levels needed for affordable housing.

The requirement of a "cause and effect" relationship was carefully addressed by Justice Scalia in his dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988). Justice Scalia's views strongly influenced Judge Beezer's dissent. Judge Beezer's quotation from the *Pennell* dissent (App. A-14) need not be repeated. But it is important to note that the essence of the *Pennell* dissent was the simple "unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation." 485 U.S. at 23. And it is also important to note how that dissent stressed that the social problem of poor tenants being unable to afford reasonably priced housing "is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages . . . ." 485 U.S. at 21. In a similar manner, it is also equally clear that those who build structures to house businesses, which

enable a community to provide needed jobs, cannot be held responsible for the fact that some job applicants may need affordable housing.

As clear as the *Pennell* dissent is on this issue, the difficulty is that *it is contained in a dissent*. The majority did not find it necessary to address the issue. In light of the Ninth Circuit's decision herein, and the impact it will have across the country, this Court should now carefully address the requirements of "cause and effect" for nexus purposes. Its views should be expressed in a majority opinion.

In this regard, the City seeks to avoid the obvious implications of the grant of summary judgment by arguing that those opposing the legislative enactment of the ordinance should have presented studies in opposition at the legislative hearings held prior to its enactment. Although the City's nexus analysis was challenged at the time, it is appalling to suggest that property owners must appear at legislative hearings opposing proposed legislation that will place an undue restriction on the use of their properties. Of course, no case is cited for such a proposition. The question of whether legislation imposes an undue restriction on the use of real property, absent an owner's willingness to cave in to governmental demands, is a question for the courts invoking a proper interpretation of the Fifth Amendment's Takings Clause.

THE NINTH CIRCUIT'S OPINION EXPRESSLY REJECTED THIS COURT'S HEIGHTENED SCRUTINY REQUIREMENT

Although the *Nollan* decision nowhere uses the term "heightened scrutiny," the opinion nevertheless says that the standard of review in regulatory takings cases is different from that in due process or equal protection cases. The Court specifically rejected the "rationally related" standard used in equal protection and due process cases. *Nollan*, 483 U.S. at 834 n.3. And, as the *Nollan* opinion reflects, this Court adopted a standard quite different from that previously employed by California appellate courts. The standard of review employed in these prior cases was specifically addressed in *Nollan*, 483 U.S. at 830. As stated in the post-*Nollan* case of *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 1270 (1991): "Whether the new standard be described as a 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." (Footnotes omitted.)

The City's Brief in Opposition now argues that the Ninth Circuit actually applied a heightened degree of scrutiny. *Id.* at 22. This is a gross misstatement of the opinion. The opinion speaks for itself: "[W]e are not persuaded that *Nollan* materially changes the level of scrutiny we must apply." App. A-6.

The Ninth Circuit not only pursued a "rational basis" test, it went on to approve a distinction between monetary exactions and those which involve a physical encroachment on land. App. A-6. The court said that other courts have not interpreted *Nollan* as changing the level of scrutiny in cases which do not involve a physical encroachment on land. This reasoning was later

employed by a California appellate court in *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992). There the court, relying on the Ninth Circuit's opinion herein, accordingly viewed *Nollan* as a *possessory taking* case rather than a *regulatory taking* case and concluded that heightened scrutiny applies only in a possessory takings context.

The reasoning employed in *Blue Jeans Equities* and by the Ninth Circuit here is demonstrably wrong. *Nollan* was not a possessory taking case. The Court there employed regulatory takings analysis which can be traced back through such regulatory takings cases as *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. City of New York*, 383 U.S. 104; *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), and to the case where this Court first announced its regulatory takings doctrine—*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). There is no question but that this Court was using and applying a regulatory takings analysis when it announced its heightened scrutiny requirement. Indeed, this Court, in adopting a higher level standard of review, expressly found that an assumption to the contrary in *Goldblatt v. Town of Hempstead* was "inconsistent with the formulations of our later cases." *Nollan*, 483 U.S. at 834 n.3. Yet *Goldblatt* was a *regulatory taking case*. Obviously, this Court in *Nollan* would have had no occasion to disapprove language in a regulatory taking case if it intended its analysis to be solely applicable to possessory takings cases.

This Court's decision in *Yee v. City of Escondido* may help in clarifying the true nature of the *Nollan* decision and the distinction between possessory and regulatory takings. But the Ninth Circuit's treatment of *Nollan* as a possessory taking case will remain on the books creating

massive confusion even though its decision is in major conflict with any careful reading of *Nollan* and *Yee*.

CONCLUSION

Review by this Court is particularly necessary to address the "cause and effect" relationships required to show a sufficient nexus under *Nollan* and to address the decisional conflicts in the application of *Nollan*'s heightened scrutiny requirement. For the reasons stated in the petition, and for the reasons stated above, it is respectfully requested that certiorari be granted.

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Respectfully submitted,

RONALD A. ZUMBRUN
EDWARD J. CONNOR, Jr.
*JOHN M. GROEN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Petitioner